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Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty

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Since the seminal case of *Monroe v. Pape*,[1] the Supreme Court has struggled to separate constitutional and common-law torts.[2] Before *Monroe*, courts assumed that the two types of tort were mutually exclusive: if a defendant's conduct violated state law, the conduct could not be "under color of" state law, which is a prerequisite to an action under section 1983 of title 42 of the United States Code.[3] *Monroe* determined that action in violation of state law came within the sweep of section 1983, which necessarily meant that official conduct could constitute

* Associate Professor of Law, Wayne State University. I would like to thank Martin Kriegel and Clark Cunningham for many useful comments on earlier drafts.

1. 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Servs., 436 U.S. 658 (1978). In *Monroe*, the Court considered an action under 42 U.S.C. § 1983 for damages against Chicago police officers who had illegally searched, detained, and harassed the plaintiff and his family. The defendants argued that because their conduct, if proven, violated state law, the plaintiff's only remedy was under state law in state court. The *Monroe* Court held, however, that a state official's action can be both a violation of state law and an action "under color of" state law that violates federal rights. *Monroe*, 365 U.S. at 184-87. When that is the case, "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183.

2. The term *constitutional tort* describes any action for damages for violation of constitutional rights, either against federal defendants, usually under the implied right-of-action theory of Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395-97 (1971), or against state and local defendants, usually under 42 U.S.C. § 1983. The phrase is attributed to Professor Shapo. *See* Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 323-24 (1965).

3. 42 U.S.C. § 1983 (1982). *See Monroe*, 365 U.S. at 205-59 (Frankfurter, J., dissenting). Though the Court had long ago discarded this theory as a test of state action for *constitutional* purposes, *see* Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 288-89 (1913), courts continued to read pre-*Home Telephone* concepts into § 1983 on the theory that the 1871 Congress intended the earlier concepts when it used the term "under color of" state law in § 1983, *see* P. LOW & J. JEFFRIES, CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES 12-15 (1988).

both a state common-law and a federal constitutional tort. Unfortunately, the Court did not explain how one might tell the difference between the two.

The need to distinguish between constitutional and common-law torts has become more important in recent years as the Court has embarked on a campaign to ensure that common-law torts do not "sneak" into federal court disguised as constitutional claims.[4] In the process, however, the Court has failed to formulate a coherent theory of precisely how the two differ from each other.

The Court's most recent solution to the problem is reflected in *Daniels v. Williams*[5] and *Davidson v. Cannon*.[6] In *Daniels* and *Davidson*, the Court imposed a culpable state of mind requirement for all violations of the due process clause, which accounts for most constitutional tort actions. According to the Court, conduct of government officials that amounts to "mere negligence"[7] does not violate the due process clause, because a "deprivation" of life, liberty, or property means something more than a "mere lack of due care by a state official."[8]

4. *See* Hudson v. Palmer, 468 U.S. 517, 533-36 (1984); Parratt v. Taylor, 451 U.S. 527, 544 (1981); Baker v. McCollan, 443 U.S. 137 (1979); Paul v. Davis, 424 U.S. 693, 701 (1976); *infra* notes 21-37 and accompanying text.

5. 474 U.S. 327 (1986).

6. 474 U.S. 344 (1986).

7. *Daniels*, 474 U.S. at 334.

8. *Id.* at 330-31. The rule was applied in *Daniels* and *Davidson* to dismiss § 1983 damages actions brought by prisoners against their custodians: Daniels sued for injuries sustained when he tripped over a pillow that a guard had left on a jail stairway; Davidson sued for injuries sustained when prison officials failed to protect him from a threatened attack by a fellow inmate.

If it was true *before Daniels* that "[n]o problem so perplexes the federal courts today as determining the outer bounds of" constitutional torts, Jackson v. City of Joliet, 715 F.2d 1200, 1201 (7th Cir. 1983) (Posner, J., *dissenting*?), *cert. denied*, 465 U.S. 1049 (1984), that statement is no less true *after Daniels*. In *Daniels*'s aftermath, the lower federal courts continue to struggle no less earnestly to make sense of those boundaries and to incorporate the Court's latest effort to redefine them. A sampling of recent cases in the courts of appeals includes Harris v. Maynard, 843 F.2d 414, 416 (10th Cir. 1988); Justice v. Dennis, 834 F.2d 380, 382 (4th Cir. 1987) (en banc), *petition for cert. filed*, 56 U.S.L.W. 3626 (U.S. Feb. 22, 1988) (No. 87-1422); Marsh v. Barry, 824 F.2d 1139, 1145 (D.C. Cir. 1987) (per curiam); DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 302 (7th Cir. 1987), *aff'd*, 108 S. Ct. 998 (1989); Ketchum v. County of Almeda, 811 F.2d 1243, 1247 (9th Cir. 1987); Myers v. Morris, 810 F.2d 1437, 1468-69 (8th Cir.), *cert. denied*, 108 S. Ct. 97 (1987); Lunde v. Oldi, 808 F.2d 219, 220-21 (2d Cir. 1986); Thompson v. Olson, 798 F.2d 552, 558 (1st Cir. 1986), *cert. denied*, 480 U.S. 908 (1987); Franklin v. Aycock, 795 F.2d 1253, 1261-62 (6th Cir. 1986); Sourbeer v. Robinson, 791 F.2d 1094, 1104-05 (3d Cir. 1986), *cert. denied sub nom.* Patton v. Sourbeer, 107 S. Ct. 3276 (1987); Love v. King, 784 F.2d 708, 713 (5th Cir. 1986); Cannon v. Taylor, 782

Under *Daniels*, then, a government actor who intentionally causes harm commits a constitutional tort, but a government actor who negligently causes harm commits, at most, a common-law tort.

This Article takes the position that the *Daniels* state of mind solution is flawed and proposes a different theory for separating common-law and constitutional torts. Part I of the Article outlines the history of the United States Supreme Court's efforts to place limits on constitutional tort actions and to distinguish those actions from common-law torts. Part II analyzes and criticizes the *Daniels* solution to the problem. Part III explores the reasons for the Court's difficulties in *Daniels*. Part IV proposes a theory of duty as a means of separating constitutional and common-law torts and deals with potential objections to the theory. The Article argues that the Court should analyze the due process clause and determine the nature and extent of the duties it imposes as distinct from duties that the common law imposes. Only through a duty theory can the Court coherently distinguish those losses of life, liberty, or property that are subject to due process constraints from those losses that state tort law should remedy.

I. THE WINDING ROAD TO *DANIELS V. WILLIAMS*

Due process rights long have constituted a high percentage of constitutional tort cases. One reason for this is that the due process clause covers a large area. There are presently four kinds of due process: incorporated due process,[9] "fundamental

F.2d 947, 949-50 (11th Cir. 1986). *See generally* M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES § 3.5 (1986) (discussing Supreme Court due process negligence cases); S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 §§ 3.09-.10 (2d ed. 1986) (discussing *Parratt* and *Daniels* and their treatment in courts of appeals).

In addition, *Daniels* has created a new dimension of uncertainty as some lower federal courts debate whether to apply the *Daniels* state of mind test to other constitutional rights. *See* Bodine v. Elkhart County Election Bd., 788 F.2d 1270, 1272 (7th Cir. 1986) (citing *Daniels* and holding that election irregularities implicate § 1983 only if there is willful misconduct); Willocks v. Dodenhoff, 110 F.R.D. 652, 657 (D. Conn. 1986) (citing *Daniels* and finding no fourth amendment violation "when a police officer is alleged to have negligently included material false statements in an affidavit accompanying a warrant application"), *aff'd mem.*, 305 F.2d 392 (2d Cir. 1986). *But see* Uberoi v. University of Colo., 713 P.2d 894, 902-03 (Colo. 1986) (en banc) (holding that *Daniels*'s no-negligence rule applies to due process claims but not to first, fourth, fifth, and ninth amendment claims).

9. Incorporated due process includes the Bill of Rights minus the grand

rights" substantive due process,[10] "shock the conscience" substantive due process,[11] and procedural due process.[12] The other

jury and civil jury trial rights. Incorporated due process thus covers rights that the courts consider substantive, such as first amendment rights, *see, e.g.*, Near v. Minnesota, 283 U.S. 697, 707 (1931) (freedom of the press); Gitlow v. New York, 268 U.S. 652, 666 (1925) (free speech), as well as rights that the courts consider procedural, such as the criminal due process rights contained in the fourth, fifth, sixth, and eighth amendments, *see, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968) (right to jury trial); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (self-incrimination). The current standard for deciding whether the Constitution incorporates a right is set forth in *Duncan*: a right is of constitutional dimension if it is "fundamental to the American scheme of justice." *Duncan*, 391 U.S. at 148-49. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.6 (3d ed. 1986) (discussing incorporation of Bill of Rights).

10. "Fundamental rights" substantive due process includes primarily the right to privacy. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 387 (1978) (marriage); Moore v. City of East Cleveland, 431 U.S. 494, 501-06 (1977) (family); Roe v. Wade, 410 U.S. 113, 153-55 (1973) (abortion); *see also* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 9, §§ 11.7, 14.26-.30 (discussing right to privacy). Also included are the right to receive a certain minimum level of treatment, services, and safety when incarcerated by the government. *See* Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983); Youngberg v. Romeo, 457 U.S. 307, 314-25 (1982).

11. "Shock the conscience" substantive due process comprises outrageous behavior of officials not otherwise violative of any more specific constitutional provision. Rochin v. California, 342 U.S. 165 (1952), is the genesis of this branch. *Rochin* was a criminal case in which the Court held that pumping the suspect's stomach to get evidence, although not violative of any specific provision of the Constitution, was so outrageous as to "shock the conscience" and therefore violated due process. *Id.* at 172. Near complete incorporation of Bill of Rights protections largely has dispensed with the necessity of relying on such an open-ended due process doctrine in criminal procedure cases, but the "shock the conscience" standard lives on as a basis for civil liability. *See, e.g.*, Kidd v. O'Neil, 774 F.2d 1252, 1261 (4th Cir. 1985) (finding liability under § 1983 for damage caused by police brutality), *overruled in part*, Justice v. Dennis, 834 F.2d 380 (1987); White v. Rochford, 592 F.2d 381, 385 (7th Cir. 1979) (en banc) (finding liability under § 1983 for damage caused by shocking police conduct); Johnson v. Glick, 481 F.2d 1028, 1032-33 (2d Cir.) (finding liability under § 1983 for prison guard brutality that shocked the conscience), *cert. denied sub nom.*, Employee-Officer John v. Johnson, 414 U.S. 1033 (1973); *see generally* S. NAHMOD, *supra* note 8, § 3.08 (discussing due process before *Parratt*); M. SCHWARTZ & J. KIRKLIN, *supra* note 8, § 3.3 (discussing § 1983 excessive force cases).

12. Procedural due process requires that the government follow certain procedures to accomplish deprivations of life, liberty, or property. *See* Hudson v. Palmer, 468 U.S. 517, 533 (1984); Parratt v. Taylor, 451 U.S. 527, 536-37 (1981); Mathews v. Eldridge, 424 U.S. 319, 349 (1976); Fuentes v. Shevin, 407 U.S. 67, 96 (1972); Goldberg v. Kelly, 397 U.S. 254, 260-61 (1970); *see generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 9, § 13.1-.10 (discussing procedural due process). Although the Court has not explicitly delineated them, two subcategories of procedural due process exist: a "regularized deprivation" division (headed by *Goldberg*) and a "random and unauthorized conduct" divi-

reason that due process is disproportionately represented in constitutional tort cases is that two of the forms of due process rights have not had clearly articulated limits: "shock the conscience" substantive due process and procedural due process claims to redress "random and unauthorized" personal injury and property damage by government officials. In a line of cases decided over the last ten years or so, the Court has struggled to distinguish between these two forms of due process and to define the boundaries between them and common-law torts, redefining as necessary to limit the types of injuries for which a remedy is available under the due process clause.

More than ten years ago, these two forms of due process were not separated from each other as they are today. At that time, a complainant seeking damages to redress an injury caused by a government action that did not violate some more specific constitutional guarantee could bring a suit alleging simply that a government official had caused a deprivation of life, liberty, or property without due process. The deprivation element of the claim was relatively clear; the "absence of due process" element was less so. Most courts would look to the Supreme Court's holding in *Rochin v. California*[13] and hold that deprivations caused by official conduct that "shocks the conscience" violated due process.[14] Because most cases involved intentional beatings or similar fact patterns,[15] one of the more well-developed due process rights was the right to be free from unjustified bodily harm.[16] A similar theory of recovery

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sion (headed by *Parratt* and *Hudson*). Whether there are really distinct subcategories depends on the resolution of an issue left open in *Daniels*: whether a post-deprivation state compensatory remedy is adequate when state sovereign immunity bars all recovery. *See infra* note 136 and accompanying text. If the absence of any remedy does not violate due process, then the *Parratt* division is sufficiently different from the *Goldberg v. Kelly* division to form its own category. *See infra* notes 91, 134.

13. 342 U.S. 165 (1952).

14. *Id.* at 172.

15. *See, e.g.*, Johnson v. Glick, 481 F.2d 1028, 1029-30 (2d Cir.) (beating by police), *cert. denied sub nom.* Employee-Officer John v. Johnson, 414 U.S. 1033 (1973); Wiltsie v. California Dep't of Corrections, 406 F.2d 515, 516 (9th Cir. 1968) (beatings by prison guards); Brown v. Brown, 368 F.2d 992, 993 (9th Cir.) (beating by prison guard), *cert. denied*, 385 U.S. 868 (1966).

16. Judge Friendly's opinion in *Johnson v. Glick*, an often-cited attempt to flesh out the standard for when official violence violates due process, required that courts consider "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Johnson v. Glick*, 481 F.2d at 1033. The Court still considers *John-*

developed for deprivations of property.[17]

It was perhaps not surprising, because judicial consciences typically are nurtured on generous doses of the common law, that courts increasingly would turn to the common law in an effort to define what kinds of injuries were unjustified and therefore constituted deprivations without due process. Consequently, actions for damages based on due process violations soon began to share elements with such common-law torts as false imprisonment[18] and malicious prosecution.[19] To the extent that courts consciously considered the coincidence of constitutional and common-law elements, they considered the common law relevant to due process claims because the due process clause "was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown."[20]

The Supreme Court, however, rejected the notion that courts could define due process protections by simple reference to traditional common-law tort doctrines. In *Paul v. Davis*,[21] the plaintiff claimed that the Louisville police chief falsely labeled him an "active shoplifter" in a circular sent to merchants and thus had violated both procedural and substantive due process.[22] Declaring that it would not allow the due process clause

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son good law. *See* Davidson v. Cannon, 474 U.S. 344, 348 (1986); *see also* Whitley v. Albers, 475 U.S. 312, 320-21 (1986) (quoting *Johnson* on when good faith immunity would excuse official violence). It is not certain, however, whether the Court approved *Johnson* as the substantive due process case it was when it was decided or as a post-deprivation procedural due process case, which it might have become after *Parratt*. *See infra* notes 28-37 and accompanying text; *see also* Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 991 n.83 (1986) (suggesting other possible explanations of *Johnson* decision).

17. *See, e.g.*, Kimbrough v. O'Neil, 545 F.2d 1059, 1061 (7th Cir. 1976) (en banc) (explaining under what circumstances state agent taking property violates due process); Carter v. Estelle, 519 F.2d 1136, 1136-37 (5th Cir. 1975) (per curiam) (same).

18. *See, e.g.*, Whirl v. Kern, 407 F.2d 781, 793 (5th Cir.) (relying on common-law false imprisonment for proposition that even reasonable conduct resulting in false imprisonment will cause a due process violation), *cert. denied*, 396 U.S. 901 (1969); *cf.* Baker v. McCollan, 443 U.S. 137, 145-46 (1979) (finding no duty to investigate detained arrestee's claims of mistaken identity).

19. *See* Conway v. Village of Mount Kisco, 750 F.2d 205, 213-15 (2d Cir. 1984), *cert. dismissed*, 479 U.S. 84 (1986). The Court had granted certiorari to decide whether the elements of common-law malicious prosecution satisfy the requirements for a due process violation, but dismissed the writ as improvidently granted.

20. Ingraham v. Wright, 430 U.S. 651, 672-73 (1977).

21. 424 U.S. 693 (1976).

22. *Id.* at 694-96.

to become a "font of tort law to be superimposed upon whatever systems may already be administered by the states,"[23] the Court held that no liberty or property interest was at stake and that only state tort law could protect plaintiff's interest in his reputation.[24] Three years later, in *Baker v. McCollan*,[25] the Court determined that a plaintiff held in jail for three days because of mistaken identity did not have a claim for violation of due process, although an action might lie for false imprisonment under state common law.[26] In the Court's words, "false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official."[27] In none of these cases, however, did the Court clarify the circumstances in which actions by a state official that are tortious under state law *would* become due process violations.

The Court finally clarified such circumstances in *Parratt v. Taylor*[28] and *Hudson v. Palmer*,[29] and the answer transformed many of what previously would have been substantive due process cases into procedural ones.[30] In *Parratt*, prison officials in charge of the mail room and prisoner hobbies accidentally lost the plaintiff prisoner's twenty-three dollar hobby kit.[31] In *Hudson*, prison officials intentionally confiscated plaintiff's personal property during a "shakedown" of his cell.[32] The Court in both cases held that, although these losses amounted to deprivations of property under the due process clause, the deprivations were compensable civil wrongs under state law and availability of that remedy sufficed as all the "process" that was "due."[33] The Court explained that in some circumstances a post-deprivation hearing could satisfy due process.[34] In sug-

23. *Id.* at 701.

24. *Id.* at 712. In *Daniels*, the Court restated its rejection of the idea that lower courts can rely on the common law in constitutional tort cases, at least to the extent that the court bases its holding on "the notion that all common-law duties owed by government actors were somehow constitutionalized by the Fourteenth Amendment." *Daniels*, 474 U.S. at 335.

25. 443 U.S. 137 (1979).

26. *Id.* at 146-47.

27. *Id.* at 146.

28. 451 U.S. 527 (1981).

29. 468 U.S. 517 (1984).

30. The Court left under substantive due process those cases in which the deprivations were so outrageous that no amount of process would cure them. *See* M. SCHWARTZ & J. KIRKLIN, *supra* note 8, § 3.9; *supra* note 9.

31. *Parratt*, 451 U.S. at 529.

32. *Hudson*, 468 U.S. at 520.

33. *Id.* at 533; *Parratt*, 451 U.S. at 543.

34. *Parratt*, 451 U.S. at 538-41. Mathews v. Eldridge, 424 U.S. 319, 332-49

gesting that post-deprivation remedies are sometimes satisfactory, the Court reasoned that prior notice and hearing are impossible when random and unauthorized governmental action, whether intentional or negligent, causes losses of liberty[35] or property.[36] Thus, there is no constitutional violation unless those state-law compensatory remedies are unavailable or inadequate.[37]

In reaching this result, the Court rejected a suggested alternative approach for restricting due process claims in *Parratt*. That suggestion, which had been raised but left undecided in *Procunier v. Navarette*[38] and *Baker v. McCollan*,[39] was to impose a culpable state of mind requirement that would exclude all negligent conduct. The Court could read such a requirement either into section 1983 or into the due process clause. In *Parratt* the Court rejected the argument, holding that neither section 1983 nor the due process clause contained state of mind requirements.[40]

The state of mind solution soon would look more appealing to the Court as it became clear that states were resisting even the modest requirements of *Parratt*.[41] Although states could have insulated themselves from suit in federal court by providing adequate damages in their own courts against themselves or their employees, many states refused to do so. Consequently, with lower courts debating whether state sovereign immunity violated due process under *Parratt* and *Hudson*,[42] the Court

(1976), contains the most recent and complete analysis of when post-deprivation process is sufficient. *But see infra* note 91 (discussing the apparent inapplicability of *Eldridge* to random and unauthorized deprivations).

35. Although *Parratt* and *Hudson* involved property deprivations, the *Parratt* Court's citation to the earlier case of Ingraham v. Wright, 430 U.S. 651 (1977), demonstrates that the same rationale applied to liberty interests. In *Ingraham*, the plaintiffs contended that corporal punishment in the public schools violated substantive due process. *Id.* at 653. The Court held, however, that it did not violate procedural due process, because excessive punishment was actionable as a common-law tort in the state courts. *Id.* at 672.

36. *Hudson*, 468 U.S. at 532-33; *Parratt*, 451 U.S. at 541.

37. *Hudson*, 468 U.S. at 532-33; *Parratt*, 451 U.S. at 541-42.

38. 434 U.S. 555, 562-66 (1978).

39. 443 U.S. 137, 146 (1979).

40. *Parratt*, 451 U.S. at 534-35.

41. Justice Powell warned of this in his concurring opinion in *Parratt*, 451 U.S. at 550-51 (Powell, J., concurring).

42. *Compare* Rittenhouse v. DeKalb County, 764 F.2d 1451, 1458 (11th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986), Smith v. Rose, 760 F.2d 102, 106 (6th Cir. 1985), *and* Williams v. Morris, 697 F.2d 1349, 1351 (10th Cir. 1982) (per curiam) *with* Daniels v. Williams, 748 F.2d 229, 235 (4th Cir. 1984) (Phillips, J., dissenting in part and concurring in part), *aff'd*, 474 U.S. 327 (1986), Harper v.

adopted the state of mind limitation it had rejected in *Parratt*. In *Daniels v. Williams*[43] and *Davidson v. Cannon*,[44] the Court held that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property."[45] In *Daniels*, the plaintiff prisoner was injured in a county jail when he tripped on a pillow that a guard negligently had left on a stairway.[46] In *Davidson*, a prisoner was attacked by a fellow inmate after he had been threatened and had notified prison officials, who ignored the notice and did nothing to prevent the attack.[47] The Court found no violation of due process in either case because the negligent loss did not constitute a deprivation of liberty or property. The Court reasoned that the word *deprive* connotes more than mere negligence and also noted that due process is not implicated when there has been no "affirmative abuse of power."[48] The Court in *Davidson* emphasized the breadth of its holding, observing that "the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials."[49]

Scott, 577 F. Supp. 15, 17-18 (E.D. Mich. 1984), *aff'd*, 803 F.2d 719 (6th Cir. 1986), Groves v. Cox, 559 F. Supp. 772, 775-77 (E.D. Va. 1983), Hight v. Burden, 180 Ga. App. 716, 717-18, 350 S.E.2d 471, 472-73 (1986) *and* Shields v. Martin, 109 Idaho 132, 140, 706 P.2d 21, 29 (1985). *See also* M. SCHWARTZ & J. KIRKLIN, *supra* note 8, § 3.8 ("a procedure which is preordained to deny relief regardless of the strength of the claim on the merits is not meaningful process"); *infra* note 136 (criticizing Justice Stevens's views to contrary stated in his concurrence in *Daniels*). Sovereign immunity was not an issue in *Parratt* or *Hudson* because the states had waived it to the extent necessary for a constitutionally adequate remedy. *See Hudson*, 463 U.S. at 534-36; *Parratt*, 451 U.S. at 543-44.

43. 474 U.S. 327 (1986).

44. 474 U.S. 344 (1986).

45. *Daniels*, 474 U.S. at 328 (emphasis in original); *see also Davidson*, 474 U.S. at 347 (concluding that "where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required").

46. *Daniels*, 474 U.S. at 328.

47. *Davidson*, 474 U.S. at 345-46.

48. *Daniels*, 474 U.S. at 330 (quoting *Parratt*, 451 U.S. at 548-49 (Powell, J., concurring)).

49. *Davidson*, 474 U.S. at 348. The *Daniels* Court used state of mind to describe the actor's attitude about the effect of his conduct, excluding acts "causing unintended loss of or injury to life, liberty, or property." *Daniels*, 474 U.S. at 328; *see also* RESTATEMENT (SECOND) OF TORTS § 8A (1965) (using actor's state of mind regarding effect to define "intent").

The Court could have had in mind two other definitions of state of mind, but that is unlikely. The Court spoke of requiring an "affirmative abuse of power" and referred to a "mere lack of due care" (defined as a "failure to measure up to the conduct of a reasonable person") as insufficient. *Daniels*, 474 U.S. at 330-32. These comments suggest a possible misfeasance-nonfeasance

The Court clearly indicated in *Daniels* that it would consider *intentional* conduct causing a loss to be a deprivation and hinted in dictum that something less might suffice.[50] The Court observed, however, that the facts of *Davidson* did not meet this standard, because the prison officials who received a note explaining the threat, "[f]ar from abusing governmental power, or employing it as an instrument of oppression, . . . mistakenly believed that the situation was not particularly serious, and . . . simply forgot about the note."[51]

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test, but the Court did not develop it. Although commentators have criticized such a distinction as analytically useless, it is not unknown in common-law tort actions against government actors. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Moreover, the Court used an example in *Davidson* of a nonfeasance due process violation case in which guards stood by while inmates beat a prisoner. *See Davidson*, 474 U.S. at 348.

The second possible definition of state of mind arises from the *Daniels* Court's emphasis that due process cases traditionally have involved "*deliberate* decisions of government officials to deprive a person of life, liberty, or property," *Daniels*, 474 U.S. at 331 (emphasis in original). This reference suggests that a plaintiff can establish a deprivation by showing that the defendant merely gave thought to the action before doing it. As Justice Blackmun pointed out in his dissent in *Davidson*, however, many deliberate acts are negligent. *Davidson*, 474 U.S. at 353 n.2 (Blackmun, J., dissenting); *see also infra* note 100 (distinguishing deliberate action and deliberate result). In this respect, it is perhaps significant that the Court in *Daniels* quoted the portion of Justice Powell's *Parratt* concurrence referring to affirmative abuses of power, *see supra* note 48, but omitted the portion indicating that "a deliberate decision not to act to prevent a loss" also can constitute a deprivation, *Parratt*, 451 U.S. at 548 (Powell, J., concurring).

50. *Daniels*, 474 U.S. at 334-35 (suggesting that recklessness or gross negligence might be sufficient).

51. *Davidson*, 474 U.S. at 348. Justices Marshall, Blackmun, and Stevens have rejected the Court's negligence holding. *See id.* at 349-60 (Blackmun & Marshall, JJ., dissenting); *Daniels*, 474 U.S. at 336-43 (Stevens, J., concurring). Justice Stevens based his agreement with the result on his view that the state remedies under *Parratt* and *Hudson* were adequate, despite sovereign immunity. *See infra* note 136. Justice Brennan, who agreed that negligence did not suffice to constitute a deprivation, dissented from the result in *Davidson* because he believed that the facts established recklessness or deliberate indifference. *Davidson*, 474 U.S. at 349.

II. A CRITIQUE OF THE STATE OF MIND REQUIREMENT AS A BOUNDARY BETWEEN CONSTITUTIONAL AND COMMON-LAW TORTS

A. NEITHER THE WORDING IN NOR THE POLICIES BEHIND THE DUE PROCESS CLAUSE SUPPORT A STATE OF MIND REQUIREMENT

The *Daniels* Court based its holding in part on semantics: that "the word 'deprive' in the Due Process Clause connote[s] more than a negligent act."[52] One serious problem with this conclusion is that the Court creates a meaning for the term *deprive* that is at odds with its meaning in section 1983, a provision closely related to the due process clause. Section 1983, which is the primary vehicle used to institute due process claims against state actors, requires courts to hold liable any person who, acting under color of state law, subjects another to the "deprivation" of federal rights.[53] The Court has held that "nothing in the language of section 1983 or its legislative history limits the statute to intentional deprivations of constitutional rights."[54] Although there are sometimes good reasons for giving identical words different meanings in different con-

52. *Daniels*, 474 U.S. at 330 (quoting *Parratt*, 451 U.S. at 548-49 (Powell, J., concurring)). The Court in *Daniels* used the oblique device of quoting and paraphrasing Justice Powell's conclusions (but not much of his reasoning) from his *Parratt* concurrence, rather than constructing its own argument from the ground up. This presents a major obstacle both to understanding and criticism, with the result that the *Daniels* opinion is not only short, but also cryptic and sterile.

53. 42 U.S.C. § 1983 (1982).

54. *Parratt*, 451 U.S. at 534. The Court in *Parratt* contrasted § 1983's criminal counterpart, 18 U.S.C. § 242, which applies only to a person who, under color of law, "*willfully* subjects any inhabitant . . . to the *deprivation* of any [constitutional right]." *Parratt*, 451 U.S. at 534 (quoting 18 U.S.C. § 242 (1982)) (emphasis added by Court). The Court also observed the well-established fact that Congress passed § 1983 in part "to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect*, intolerance or otherwise, state laws might not be enforced and the [fourteenth amendment rights of citizens] . . . might be denied by the state agencies." *Id.* at 534-35 (quoting Monroe v. Pape, 365 U.S. 167, 180 (1961)) (emphasis added); *see also Daniels*, 474 U.S. at 329-30 (contrasting the state of mind provisions in §§ 1983 and 242); Baker v. McCollan, 443 U.S. 137, 139-40 (1979) (discussing requisite state of mind under § 1983). Congress extensively debated the lack of a state of mind requirement in § 1983. *See* Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved From Extinction?*, 55 FORDHAM L. REV. 1, 17 n.87 (1986) (discussing ramifications of § 1983 as strict liability statute, including possible use of "risk analysis" to determine liability).

texts,[55] the Court provides none here. The Congresses that framed section 1983 and the fourteenth amendment included many of the same people. The framers believed that section 1983 reenacted or codified the fourteenth amendment.[56] It is highly unlikely that *deprive* could mean one thing in the fourteenth amendment and something else in an act passed three years later to enforce the provisions of the fourteenth amendment.[57]

Moreover, if the term *deprive* means what the Court in *Daniels* says it does, then there is no escape from the conclusion that negligent conduct will not trigger *any* of the due process clause protections.[58] Incorporated and substantive due process rights—like the procedural due process rights involved in *Daniels* and *Davidson*—derive their applicability to the states solely from the injunction of the due process clause that states not "deprive" persons of those rights. Thus, parties contesting state actions that violate rights as diverse as incorporated criminal due process rights, first amendment free speech rights, and the substantive due process right to an abortion, must prove intent or recklessness. This makes the Court's re-

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55. *See, e.g.*, Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 491-92 (1983) (article III "arising under" federal law language is broader than identical language in 28 U.S.C. § 1331).

56. Senator Edmunds, the Senate manager of the bill that contained § 1983, described it as "so very simple and really reenacting the Constitution." CONG. GLOBE, 42d Cong., 1st Sess. 569 (1871); *see also id.* app. at 150-51 (statement of Rep. Garfield) (stating intent that § 1983 conforms to scope of rights that fourteenth amendment guaranteed); *id.* app. at 81-86 (statement of Rep. Bingham) (author of the fourteenth amendment making same point).

57. *See* Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (§ 1983 as originally enacted). The original title of the Act reads: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." *Id.*

In Reiche v. Smythe, 80 U.S. (13 Wall.) 162, 165 (1872), the Court held that when

> [b]oth acts are *in pari materia* . . . it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention.

Id.; *see also* United States v. Montgomery Ward & Co., 150 F.2d 369, 377 (7th Cir.), *vacated as moot*, 326 U.S. 690 (1945) (stating that a "rather heavy load rests on him who would give different meanings to the same word or the same phrase when used a plurality of times in . . . Acts which are *in pari materia* with each other").

58. *See Davidson*, 474 U.S. at 348, quoted in text at note 49, *supra* and in notes 9-12, *supra*, and accompanying text (discussing four categories of due process rights).

assurance in *Daniels* that state actors may violate other constitutional provisions merely by acting with lack of due care[59] rather puzzling, unless the reference is to the contracts clause,[60] the privileges and immunities clause,[61] or the dormant commerce clause.[62] One might argue that this criticism gives undue regard to the incorporation doctrine and the literal language of the due process clause. Neither the Court nor commentators, however, have suggested any basis *other* than the due process clause for applying constitutional prohibitions against the states that by their terms and history are directed solely at the federal government, or for enforcing "fundamental rights" against either the states or the federal government.[63]

59. *Daniels*, 474 U.S. at 334.

60. U.S. CONST. art. I, § 10, cl. 1.

61. U.S. CONST. art. IV, § 2, cl. 1.

62. U.S. CONST. art. I, § 8, cl. 3. The Court in *Daniels* charged that allowing recovery for negligence would "trivialize the centuries-old principle of due process of law." *Daniels*, 474 U.S. at 332. The absence of any such effect on the just slightly younger principles of the fourth amendment, however, belies this charge. *See* United States v. Leon, 468 U.S. 897, 922 (1984) (holding that search conducted pursuant to subsequently invalidated warrant violates fourth amendment, but application of exclusionary rule is inappropriate if "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant [is] objectively reasonable"), *cited in Davidson*, 474 U.S. at 356 n.6 (Blackmun, J., dissenting); *see also* Briggs v. Malley, 748 F.2d 715, 721 (1st Cir.) (holding that judicial approval of warrant will not insulate officer from damages liability for "constitutional negligence" if, for instance, "the officer should have known that the facts . . . did not constitute probable cause"), *aff'd*, 475 U.S. 335, 345-46 (1986). In affirming *Briggs*, the Supreme Court did not use the term *negligence*, but did rely on the "objective reasonableness" standard of *Leon*, holding that liability would result when "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Briggs*, 475 U.S. at 344-45; *see also* Willocks v. Dodenhoff, 110 F.R.D. 652, 657 (D. Conn.) (citing *Daniels* and holding that no fourth amendment violation exists "when a police officer is alleged to have negligently included material false statements in an affidavit accompanying a warrant application"), *aff'd mem.*, 305 F.2d 392 (2d Cir. 1986); *cf.* Weatherford v. Bursey, 429 U.S. 545, 548 (1977) (holding that state must intentionally intercept or use attorney-client communications in order for informant's participation in attorney-client meetings to violate sixth amendment right to counsel).

63. Because the due process clause would not "filter" Bill of Rights restraints operating on federal officials, a side effect of applying *Daniels*'s definition of *deprive* to due process incorporation is that a lower threshold of state of mind applies to state officials than to federal officials. *Cf.* Butz v. Economou, 438 U.S. 478, 478 (1978) (stating that courts should not distinguish between liability requirements in *Bivens* actions against federal officers and § 1983 actions against state officers). Interestingly, when the Court created the *Bivens* cause of action, it spoke of the incongruity between the ability of persons who suffered deprivations of constitutional rights at the hands of state officers to recover and the inability of those who were deprived of their rights

If state of mind has any relevance to *deprive*, it is, as Justice Stevens states in his *Daniels* concurrence that " '[d]eprivation' . . . identifies, not the actor's state of mind, but the victim's infringement or loss."[64] The framers could have intended deprivation to require only that a government actor causes the loss of the right or interest referred to in the due process clause.[65] To the extent that a person's state of mind is relevant, deprivation is in the mind of the "deprivee," not the "depriver."[66]

Although the Court in *Daniels* relies on semantic indicators in the word *deprive* for its state of mind holding, the Court also found support in what it saw as the primary policy underlying the due process clause: protection from "abuse of power."[67] The Court based this conclusion on the "touchstone" of the due process clause: "to secure the individual from the arbitrary exercise of the powers of government."[68]

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by federal officials to recover. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

64. *Daniels*, 474 U.S. at 341 (Stevens, J., concurring).

65. It is easy to read too much into the wording chosen for constitutional provisions, absent some collateral guarantee that the framers of the provision meant for certain words or phrases to be terms of art. One determined to go down the semantic road laid by *Daniels* could have a field day with the subtle communication of the framers' intent lurking in the differences in the language and sentence structure in the Bill of Rights. There is the flat prohibitory language of the first amendment ("Congress shall make no law . . . ."), the passive prohibitory injunction of the fifth ("No person shall be held to answer . . . .") and eighth ("Excessive bail shall not be required . . . .") amendments, the permissive, passive statement of rights in the second ("[T]he right of the people . . . shall not be infringed."), fourth ("The right of the people . . . shall not be violated . . . ."), amendments, and seventh ("[T]he right of trial by jury shall be preserved . . . .") and the permissive, active guarantees of the sixth ("[T]he accused shall enjoy the right to . . . .") amendment.

66. Justice Rehnquist, the author of the majority opinion in *Daniels*, relied once before on a semantic analysis of the Bill of Rights. In Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), he maintained that the plaintiff had no standing to contest the government's action in giving surplus Army real estate to the Assemblies of God, because the wording of the first amendment ("*Congress* shall make no law respecting an establishment of religion" U.S. CONST. amend. I (emphasis added)) showed that it restricted only the exercise of *legislative* power, not executive power. *Valley Forge*, 454 U.S. at 479. The Court has not since relied on this reading of the first amendment. If Justice Rehnquist's reading in *Valley Forge* is correct, federal executive branch agencies would not violate the first amendment if they required all their employees to attend church on Sundays.

67. *Daniels*, 474 U.S. at 330 (quoting Parratt v. Taylor, 451 U.S. 527, 548-49 (1981) (Powell, J., concurring)).

68. *Id.* at 331 (quoting Hurtado v. California, 110 U.S. 516, 527 (1884)).

The Court's attempt to equate the terms *abuse* and *arbitrary* fails, however, at least as the terms apply to state of mind. It is true that some arbitrary actions depend "on choice or discretion"[69] and thus encompass deliberate action, and that some deliberate action is action that could be described as abusive, because the actor intends to cause injury.[70] The term *arbitrary*, however, means more. At least for the procedural strain of due process involved in *Daniels* and *Davidson*, *arbitrary* connotes action that is *unfair* regardless of the state of mind of the actor.[71] The Court completely ignores this sense of the term when it translates *arbitrary* into *abuse*.[72] Of course, those *substantive* due process violations which require that the state actor's behavior "shock the conscience" of the court will more readily fit into an abuse of power rationale than do the procedural due process violations involved in *Daniels*.[73]

The fairness concern of procedural due process is that the government will cause a loss that is erroneous under substantive law without providing sufficient attendant procedural safeguards for preventing or correcting that error. The government acts arbitrarily in the procedural due process context when it permits an unacceptably high risk that erroneous governmental action resulting in losses will go unchecked.[74]

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69. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 110 (1986) (defining *arbitrary*).

70. In addition, deliberate action often is merely negligent. *See Daniels*, 474 U.S. at 353 n.2 (Blackmun, J., dissenting); PROSSER & KEETON, *supra* note 49, at 171; *see also infra* notes 97-100 and accompanying text (discussing cases in which deliberate action constituted negligent conduct). For example, a motorist deliberately may decide, just this once, to run a red light.

71. *See Daniels*, 474 U.S. at 331.

72. *See supra* note 9, *infra* note 91 and accompanying text. *Daniels* and *Davidson*, however, were *procedural* due process cases.

73. *See infra* note 80 and accompanying text.

74. This fairness notion finds support in a long line of procedural due process cases. *See* Mathews v. Eldridge, 424 U.S. 319, 343-47 (1976); Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972); Goldberg v. Kelly, 397 U.S. 254, 255, 268 (1970). *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), stated the general proposition in nearly identical language when the Court found that the Illinois limitations statute violated due process because it created an "unjustifiably high risk that meritorious claims [would] be terminated." *Id.* at 434-35. The procedural due process theory is nothing more than a paraphrase of the first and second factors in the three-factor procedural due process calculus set forth in *Mathews v. Eldridge*, the prevailing test for determining what procedural due process requires. *Eldridge*, 424 U.S. at 335 (considering value of interests at stake and "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"). The third *Eldridge* factor requires that the court weigh against these factors the government's interest in taking the disputed

Thus, the "abuse" of power is the unfairness that results from the failure to provide an opportunity to redress or to prevent an erroneous but *morally neutral use* of power. When the government abuses its power in this way, the state of mind of the government agent causing the loss is irrelevant. Losses are inevitable and, so long as the government causes the loss, how the loss comes about is unimportant; what is crucial is how the government reacts to the problem of losses.[75]

Although all this is absolutely clear from the procedural due process case law, in *Daniels* and *Davidson* the Court neither cites nor discusses any of the standard procedural due process cases.[76] The Court even recognizes, at the beginning of its due process discussion, that "[b]y requiring the government to follow appropriate procedures. . . ," *procedural* due process *"promotes fairness"* and that it is *substantive* due process that *"serves to prevent governmental power from being 'used for purposes of oppression.'"*[77] Although the Court acknowledges that the cases at hand involve *"procedural* due process, pure and simple,"[78] it never mentions fairness again and instead pins the "oppression" or "abuse" label on *procedural* due process.[79]

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action. If the Court is correct that all governmental action—to cause a constitutional deprivation—must "abus[e] governmental power, or [employ] it as an instrument of oppression," *Davidson*, 474 U.S. at 348, it is hard to see how the government's interest ever could have any positive value to weigh against the other two *Eldridge* factors.

75. Some commentators ascribe an even broader policy to procedural due process, one that recognizes the dignity interests of the individual. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 503 (1978) (stating that "the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome" and "express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one"); Michelman, *Formal and Associational Aims of Procedural Due Process*, in DUE PROCESS NOMOS XVIII 127-28 (1977) (noting the psychological importance of "the participatory opportunity," regardless of result); *see also* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of Value*, 44 U. CHI. L. REV. 28, 46-57 (1976) (presenting a "value-sensitive approach" to the *Eldridge* due process analysis). One need not go this far, however, to agree that it is fairness that is the focus of procedural due process.

76. *See, e.g.*, *Logan*, 455 U.S. at 422; *Eldridge*, 424 U.S. at 319; *Fuentes*, 407 U.S. at 67; *Goldberg v. Kelly*, 397 U.S. at 254.

77. *Daniels*, 474 U.S. at 331 (emphasis added) (citation omitted); *see also supra* note 11 (discussing substantive due process violations that shock the conscience); *infra* note 82 (discussing irrelevance of fairness of process to substantive due process violations).

78. *Davidson*, 474 U.S. at 348 (quoting petitioner's brief) (emphasis added).

79. *Daniels*, 474 U.S. at 330-31. There is much in the procedural due process cases that explicitly contradicts the assertion that negligent deprivations

Not only do the policies behind procedural due process belie any state of mind requirement, but the very structure of procedural due process demonstrates the irrelevance of state of mind. The current test of procedural due process requires *both* a deprivation of life, liberty, or property *and* a failure to accord the process that is due.[80] As Justice Stevens points out in his separate opinion in *Daniels*, the due process clause does *not* say that no state shall deprive anyone of life, liberty, or property; it says only that no state shall do so *without due process of law*.[81] It is clear that a deprivation is a neutral act that becomes unconstitutional, that is, "arbitrary" or "abusive" only when not preceded or followed by the process that is due. If no process is due, or if the state affords all the process that is due, the deprivation of life, liberty, or property is not a violation of procedural due process even if the depriver causes the loss with the most malicious and wicked state of mind imaginable.[82] Conversely, if the state has not provided appropriate process, not even the most innocent state of mind on the part of the depriver will save it from liability.[83]

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are rare in procedural due process. *Goldberg v. Kelly* speaks of "erroneously terminated" welfare benefits and emphasizes that "the stakes are simply too high for the welfare recipient, and the *possibility for honest error or irritable misjudgment* too great to allow termination" without prior notice and hearing. *Goldberg v. Kelly*, 397 U.S. at 266 (quoting district court) (emphasis added). *Logan* notes that "it is the state system itself that destroys a complainant's property interest . . . whenever the Commission fails to convene a timely conference—*whether the Commission's action is taken through negligence, maliciousness, or otherwise.*" *Logan* 455 U.S. at 436 (emphasis added); *see also infra* text accompanying notes 92-94 (discussing *Goldberg v. Kelly*).

80. *See* Ingraham v. Wright, 430 U.S. 651, 672 (1977); Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976).

81. *Daniels*, 474 U.S. at 338-39 (Stevens, J., concurring).

82. It may be a violation of substantive due process, which "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *Id.* at 331.

83. Even if abuse of power requires an intentional state of mind on the part of the government official and such abuse of power is the "touchstone" of procedural due process, it is curious that, under the Court's formulation, it "touches" only the *deprivation* stage of the due process violation. *See* Franklin v. Aycock, 795 F.2d 1253, 1262 (6th Cir. 1986) (finding that intentional deprivation of right combined with negligent failure to follow procedure stated cause of action under § 1983); Sourbeer v. Robinson, 791 F.2d 1094, 1105 (3d Cir. 1986), *cert. denied sub nom.* Patton v. Sourbeer, 107 S. Ct. 3276 (1987) (noting that *Daniels* state of mind requirement does not apply to process-affording stage of procedural due process). One could imagine a scenario in which there is an unintentional deprivation, but an intentional denial of procedural protections. Consider the following two situations: (1) a welfare caseworker intentionally terminates a grant, believing the recipient is no longer eligible, but neglects to send a notice of hearing rights before the termi-

State of mind is equally irrelevant whether the process required is pre-loss or post-loss.[84] In pre-loss process cases, the deprivation is the last act necessary to complete the due process violation. It is therefore at least an understandable mistake to equate *deprivation* with *abuse*, because the deprivation is at least coincidental with the completion of the violation. It is a mistake nonetheless: if the *Daniels* rationale is applied to *Goldberg v. Kelly*,[85] in which the state terminated welfare benefits, the benefit termination violated the complainant's due process rights, because it was intentional and therefore abusive. The proper understanding of *Goldberg v. Kelly*, of course, is that the termination violated due process solely because it took place without prior notice and opportunity for a hearing; the depriver's state of mind had nothing to do with it.[86]

In post-loss process cases such as *Daniels*, the neutral nature of the deprivation is even clearer. Unlike the pre-loss process cases, the deprivation in a post-loss due process case does not complete the violation and thus has no due process significance when it occurs. Rather, due process problems arise only if the state, usually through an actor other than the depriver, later fails to provide or denies the required procedural protections.[87] Thus, the depriver's state of mind at the time of the

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nation; or (2) the termination is merely accidental and the recipient files a request for a hearing, but the caseworker intentionally throws the request away and refuses to schedule a hearing. Under *Daniels*, the first scenario is apparently a due process violation, but the second is not. Yet, it would be difficult to argue that the first situation is any more an abuse of governmental power than the second. It makes no sense at all to apply a state of mind requirement to either stage of the due process test, because state of mind has nothing to do with procedural fairness, which is what procedural due process really requires.

84. Until *Mathews v. Eldridge*, 424 U.S. 319 (1976), in all procedural due process cases in which the Court determined that some process was due, the Court held or assumed that the state should afford such process *before* the loss became final. *See* Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972); Goldberg v. Kelly, 397 U.S. 254, 266 (1970); Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

85. 397 U.S. 254 (1970). *Goldberg v. Kelly* was a class action suit by welfare recipients who had no notice or opportunity for a hearing before termination of their grants. They sued state welfare officials contending that terminations under those conditions violated procedural due process. The Court ordered that the state afford prior notice and hearing and other procedural safeguards before effectuating any termination.

86. Even in a pre-loss hearing situation, it makes little sense to equate deprivation with abuse unless the plaintiff is suing the depriver, rather than the person who failed to provide the procedural protection. Even in these situations, however, the depriver often would have no power to hold a hearing, but might be required to effectuate the deprivation. In such situations, the deprivations do not sound abusive.

87. The Court has stated that the "state action is not necessarily com-

deprivation is irrelevant in terms of *abuse* of power. Although the state may *exercise* power, it does not *abuse* power until it fails to give the process due.[88]

The only way to tie the deprivation to abuse of power in a post-loss process case is to assert that the subsequent failure to provide a hearing makes the deprivation retroactively abusive. This definition of *abuse*, however, has nothing to do with the

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plete" until the state fails to afford the process that is due. Parratt v. Taylor, 451 U.S. 527, 542 (1981) (quoting Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified*, 545 F.2d 565 (1976) (en banc), *cert. denied*, 435 U.S. 932 (1978)); *see also* Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984) (stating that unauthorized deprivation of property by prison guard does not violate due process when meaningful post-deprivation remedies are available). Strictly speaking, the due process violation does not *begin* until the state fails to provide the process due, unless we are to view all losses that the government causes as inchoate constitutional violations.

88. *See supra* text at note 82. For a differing view, see Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 98-104 (1984). Professor Redish criticizes *Parratt* on the ground that it incorrectly implies that the "loss of the prisoner's property is rendered legitimate and appropriate . . . by the provision of proper procedures." *Id.* at 100. He notes that the subsequent compensation of such negligent loss does not matter, because any illegal behavior may subsequently be compensated." *Id.* at 101. In substantive due process cases, by definition, a deprivation is illegal because no amount of process will make it proper. If it is a lack of process alone, however, that makes an otherwise legal deprivation illegal, then in a post-loss process case the deprivation is legitimate and appropriate as a matter of procedural due process until and unless the state affords no process. In *Eldridge*, for example, the Court held that the only process due Mr. Eldridge or anyone else facing a termination of Social Security benefits is a post-termination hearing. 424 U.S. at 349. If this is true, the termination was "legitimate and appropriate" at the time it occurred if the government afforded the appropriate post-loss process. The only other way in which the deprivation could be illegal is if the Social Security Act or regulations did not authorize it, but this is irrelevant to procedural due process. Similarly, in the negligent deprivation situation, such as *Parratt*, the only other way that conduct could be illegal is if it violated state law. Just as a judge would resolve the legality of Mr. Eldridge's loss at a post-deprivation administrative hearing in light of the Social Security laws, so a state court must resolve the legality of the prisoner's loss in *Parratt* in a later tort suit. If the opportunity to resolve those questions in those forums is all that procedural due process requires, the loss is legitimate as a matter of procedural due process as long as that opportunity is afforded.

It may be that many of these neutral deprivations will seem abusive, as when, for example, guards beat up an inmate or confiscate property. The sense in which these acts are abusive, however, has nothing to do with procedural due process: that question is determined by the presence or absence of the required process. The only reference point for saying that these deprivations are abusive is the substantive law governing beatings and confiscation of property; that is, state tort law. In this respect, it is ironic that the *Daniels* holding seeks to separate constitutional and common-law torts and yet defines constitutional torts by reference, not to constitutional theory, but to *abuse*—a term that has meaning only by reference to state tort law.

depriver's state of mind. It is absurd to say that the depriver's earlier state of mind changes depending on whether a different individual or entity later provides a hearing to remedy the loss. For example, it makes no sense to determine the state of mind of a guard who takes an inmate's property by asking whether that state's legislature or courts provide a remedy for inmate property losses. The only state of mind that a court reasonably could describe as abusive in post-loss process cases is one where the depriver causes the loss *knowing* that no post-deprivation remedy will be available under state law. In this situation, the depriver's state of mind is abusive, but it requires a prescience that is unlikely to exist.[89]

The basic premise that "arbitrary exercise of the powers of government" is the touchstone of due process may be accurate.[90] The Court's conclusion, however, that this premise says anything about state of mind or the proper meaning of the word *deprive* is erroneous.[91]

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89. Judges looking at the matter long after the fact often differ sharply over whether a post-deprivation remedy existed under state law. For example, the lower courts in *Daniels* divided on the question of whether, under Virginia law, state sovereign immunity would be a defense to Daniels' claim in state court. *See Daniels*, 474 U.S. at 329.

90. *See supra* text accompanying note 68.

91. A possible explanation for *Daniels*'s serious departure from procedural due process is that cases of random and unauthorized deprivation of procedural due process; exemplified by *Parratt*, *Hudson*, and *Daniels*, are in a category separate from the procedural due process cases exemplified by *Goldberg v. Kelly* and *Eldridge*. Cases from one category rarely cite or rely on cases from the other. The *Eldridge* cost-benefit factors, *see supra* note 74, apparently are not applied to cases like *Parratt* and *Hudson*. For example, *Parratt* and *Hudson* necessarily mean that it is permissible to impose a requirement that a *claimant initiate* the post-loss hearing mechanism. *See Parratt*, 451 U.S. at 541. If the Court used the balancing test of *Eldridge*, there would be no good reason why the government should not *offer* the injured party the opportunity for a post-deprivation hearing, as happened in *Eldridge*, rather than requiring that the party file suit, or at least provide the injured party with *notice of the right* to pursue any state compensatory remedy. Moreover, if the Court applied the *Eldridge* factors, the quality of the post-deprivation procedures required would depend on the magnitude of the loss involved, the other two factors being equal. *See Eldridge*, 424 U.S. at 335. Thus, deprivations of life or liberty presumably would receive more procedural solicitude than minor property losses. This distinction never has been applied in the *Parratt* line of cases. The biggest divergence between the *Goldberg v. Kelly-Eldridge* and *Parratt-Hudson* lines of cases may yet come, if Justice Stevens is correct in his concurrence in *Daniels* that the test of the quality of the process due in the *Parratt* line of cases is whether the state's overall system for compensating injuries to persons and property is fair, not whether claimants receive meaningful hearings on the merits of their claims. *Daniels*, 474 U.S. at 341-43 (Stevens, J., concurring); *see infra* note 136.

B. Problems in Applying the State of Mind Test

Even granting that the due process clause aims exclusively at abuses of power, it misses its mark when the Court's state of mind test guides its application. The test is both underinclusive and overinclusive. As construed in *Daniels*, procedural due process fails to protect against many types of actions that intuitively seem to constitute abuses of power and it brings within its scope a considerable number of actions that do not seem to be abuses.

1. Underinclusiveness

Daniels excludes all negligent deprivations, yet negligent deprivations without due process are even more abusive or oppressive than intentional deprivations without due process. Consider the basic facts of *Goldberg v. Kelly*, in which the state terminated welfare recipients' grants without prior notice or hearing.[92] Assume that the plaintiffs' welfare grants were accidentally or negligently cut off by mistake, rather than being intentionally terminated for failure to satisfy some eligibility requirement.[93] Under the *Daniels* test, the Court would not consider the loss of benefits a deprivation. Thus, there would be no right to notice, hearing, or any other process either before or after the termination.[94]

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92. 397 U.S. 254, 255-57 (1970); *see supra* note 85.

93. This could occur because the caseworker confused the plaintiffs with others, or, even more unknowingly, because the worker inputting the terminations into the computer mistyped a digit, or because the computer had a "storm" in its circuitry when the caseworker was doing something completely unrelated to the plaintiffs or to their terminations.

94. One might argue that if the termination is negligent, the prior notice and administrative hearing contemplated by *Goldberg v. Kelly* are "not only impracticable, but impossible" and thus not required by due process for that reason. *See Parratt*, 451 U.S. at 541. This argument misreads *Parratt*, which makes clear that the random and unauthorized nature of a loss does not make it any less a deprivation; it simply modifies the form and timing of the process that is due. *Id.* at 540. Even if *prior* notice and hearing are impossible, *post*-loss administrative process is possible and the Court has required it in similar circumstances. *See Eldridge*, 424 U.S. at 349. In the hypothetical above, there is no deprivation under *Daniels*, and thus no right to notice or hearing at any time. Neither *Goldberg v. Kelly* nor *Parratt* stands for the proposition that administrative due process must either be pre-loss or none at all. In addition, *Parratt*'s limitation on administrative process applies only when the deprivation results from a random and unauthorized act that is "not a result of some established state procedure," such that "the State cannot predict precisely when the loss will occur." *Parratt*, 451 U.S. at 541. *Pre*-loss process *is* possible even when the loss is random and unauthorized, so long as the loss takes place within the context of an established state procedure, because there is generally

It is perhaps a subtle distinction among bad results to say that it is worse to lose something for no reason than for a reason that you understand but with which you disagree.[95] When a caseworker intentionally terminates benefits, at least such action reflects one person's rational view of the facts and the law. When the termination occurs accidentally, it is by definition wrong. As a result, the lack of a hearing would seem more oppressive, because the amenability of the termination to correction at a hearing is much greater for the negligent than for the intentional termination. After all, a welfare recipient facing an *intentional* termination may or may not persuade the hearing officer that the caseworker's considered view of the facts and the law is erroneous. When the cut-off is *accidental*, the requirement of a hearing should reverse the termination every time.[96]

Just as an exclusive focus on the depriver's state of mind ignores the likelihood of error and ease of avoiding that error by procedural safeguards, such a focus also ignores the magnitude of the loss. Justice Blackmun's dissent in *Davidson* suggests that the majority's holding in *Daniels* would remove from the sweep of the due process clause even negligent action that causes the execution of the wrong prisoner.[97] The failure accurately to identify the condemned prisoner and the resultant ex-

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a lag between the act initiating the deprivation and the date it takes effect. Indeed, federal regulations require suspense periods for benefit termination in all federal-state welfare programs. *See, e.g.*, 45 C.F.R. § 205.10(a)(4), (6) (1987) (concerning termination under various titles of Social Security Act). Consequently, it is possible to provide prior notice and hearing opportunity when the termination is unintentional because computers can automatically generate the required notices and stop the negligently caused loss from going into effect if the affected recipient protests the action during the suspense period.

95. The latter is more consistent with the values underlying procedural due process. *See supra* note 75.

96. The Court largely determines what process is due by estimating "the probable value . . . of additional or substitute procedural safeguards" for avoiding erroneous deprivations. *Eldridge*, 424 U.S. at 335; *see supra* notes 74-79 and accompanying text.

97. *Davidson*, 474 U.S. at 350 (Blackmun, J., dissenting). The negligent conduct that led to the arrest and continued detention of the plaintiff in *Baker v. McCollan*, 443 U.S. 137 (1979), was mistaken identification. The *Baker* Court found no due process violation. 443 U.S. at 145-46. The Fifth Circuit saw the issue as whether the defendant sheriff "had negligently failed to establish certain identification procedures which would have revealed that [plaintiff] was not the man" named in the arrest warrant. *Id.* at 139. The Supreme Court skirted the negligence issue and decided against the plaintiff on the ground that the sheriff's failure to investigate was not a violation of due process. *Id.* at 145-46. *Daniels* would seem to require the same result for mistaken execution as it required for mistaken imprisonment.

ecution certainly fall within the category of "negligent acts of an official causing unintended loss of . . . life."[98] A more common problem is a police officer's accidental shooting of an arrestee.[99] If the state negligently executes the wrong prisoner, or if a police officer mishandles a weapon and creates an unreasonable risk of death or serious bodily injury to an already subdued arrestee, it is difficult to say that there has been no abuse.[100]

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98. *Daniels*, 474 U.S. at 328 (emphasis deleted); *cf.* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (holding that eighth amendment does not bar a second execution attempt when first attempt failed due to defective electric chair).

99. *See, e.g.*, Wilson v. Beebe, 770 F.2d 578, 583-84 (6th Cir. 1985) (en banc) (citing *Daniels* and holding that negligent shooting of arrestee does not result in deprivation).

100. One might argue that the *Daniels* test would not exclude a negligent execution, because it involves deliberate action on the part of state officials. The *Daniels* test, however, does not evaluate the deliberateness of the action taken, but rather examines the state of mind of the actor with respect to the effect of the actions. *See supra* note 49. The test thus excludes from due process constraints all "*negligent* act[s] . . . causing *unintended* loss of or injury to life, liberty or property." *Daniels*, 474 U.S. at 328 (first emphasis by the Court; second emphasis added). Indeed, the guard in *Daniels* deliberately could have left the pillows on the stairway. Perhaps the guard was airing the pillows, ran out of places to spread them out, considered carefully what to do with the remainder of them, and decided to place them on the stairway. The defendant in *Davidson*, deciding to do nothing in response to Davidson's note because he "mistakenly believed that the situation was not particularly serious," *Davidson* 474 U.S. at 348, certainly acted deliberately. One nonetheless might argue that the executioner in the mistaken identification hypothetical intended to cause injury to *someone* even if someone *else* actually was executed. A theory of "transferred intent" similar to the concept used in torts and criminal law, however, will not work. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW, § 3.5, at 220-22, § 3.7, at 241-42 (2d ed. 1986); PROSSER & KEETON, *supra* note 49, § 8, at 37-39. Transferred intent situations involve losses that the actor does not intend and they thus fall outside the Court's stated definition of deprivation. More importantly, the reason generally given for transferring intent does not apply to misdirected deprivations. When courts use transferred intent in torts and criminal law, the intent is transferable because the intent and act are wrongful as to both the intended victim and the unintended victim. We do not mind imposing liability for the unintended effects of the defendant's actions, because the actor's state of mind is properly "evil." *See* W. LAFAVE & A. SCOTT, *supra*, § 3.12, at 283-86; PROSSER & KEETON, *supra* note 49, § 8, at 37-39. The actor's state of mind, however, is not wrongful with respect to the intended victim in "misdirected" deprivations. Execution of the *right* prisoner or termination with notice to the *right* welfare recipient are not abuses of power. Because the depriver cannot harbor an abusive state of mind bent on oppression of an intended *legal* victim, there is no abusive state of mind to be transferred to the plaintiff. *Cf. infra* note 208 (discussing transferred intent in the exercise of power).

2. Overinclusiveness

The Court's state of mind test is overinclusive because it requires a court to find procedural due process violations in cases to which the due process clause should not extend. This result occurs because the state of mind test fails to focus on the identity of and the relationship between the plaintiff and the defendant government official.

The paradigmatic intentional act that represents an abusive or arbitrary exercise of governmental power under the *Daniels* test is the case in which a defendant guard intentionally beats a prisoner.[101] Consider a case, however, in which a guard intentionally beats the guard's supervisor rather than a prisoner. Or consider the case of a government truck driver who uses a government truck to run over her spouse's lover. Although these are intentional actions by government employees that cause injury and seem "abusive," it is hard to see them as abuses *of governmental power*.[102] If nothing else is required for these actions to be abusive or arbitrary exercises of the powers of government, surely the assailants at least must *possess* governmental power over their victims. Assaults by government employees on persons over whom they have no official power, or who have power over them, may be reprehensible, but such assaults cannot constitute abuse of the powers of government.[103]

The point is illustrated further by considering cases in which the government employee's conduct is reckless or grossly negligent. *Daniels* left open the possibility that such conduct could cause a deprivation[104] and many lower courts have so held.[105] Without necessarily disagreeing with the results in

101. *See Davidson*, 474 U.S. at 348.

102. One could argue that a more active state action test than the Court uses could resolve these hypotheticals. *See, e.g.*, Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 33 n.144 (1980) [hereinafter Whitman, *Constitutional Torts*]; *infra* notes 242-59 and accompanying text.

103. The Court emphasized in *Daniels* that "false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Daniels*, 474 U.S. at 333 (quoting Baker v. McCollan, 443 U.S. 137, 146 (1979)); *see also id.* (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976) (noting that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner")). Ironically, the *Daniels* Court's exclusive focus on state of mind necessarily means that *intentional torts* now will become fourteenth amendment violations merely because the defendant is a state official.

104. *Daniels*, 474 U.S. at 334-35 & n.3.

105. *See, e.g.*, Colburn v. Upper Darby Township, 838 F.2d 663, 668 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989); Taylor v. Ledbetter, 818 F.2d 791, 793 (11th Cir. 1987) (en banc), *cert denied*, 109 S. Ct. 1337 (1989); Justice v. Dennis,

those cases, it seems clear that the due process clause should not cover *some* situations in which grossly negligent or reckless conduct causes injury. Every government employee who causes an injury while recklessly driving a government vehicle does not thereby abuse governmental power, because most such employees have no governmental power to abuse.[106] Conversely, if a police officer interrogates a handcuffed suspect while holding a cocked pistol to the suspect's head and the gun fires, no one would doubt that such action is an abuse of power even though there was only "unintended loss of . . . life."[107] The distinction between the reckless use of a weapon by a police officer during interrogation and reckless driving by state employees is the same as the difference between a prison guard assaulting a prisoner and the same guard attacking a guard supervisor. To have an abuse of the powers of government, there must be at least a governmental power relationship between the parties. A court does nothing to test for the existence of governmental power of the depriver over the deprived by focusing exclusively on state of mind, regardless of the level of culpability employed.[108]

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793 F.2d 573, 578-79 (4th Cir. 1986), *aff'd*, 834 F.2d 380 (1987)(en banc), *petition for cert. filed*, 56 U.S.L.W. 3626 (Feb. 22, 1988)(No. 87-1422); Coon v. Ledbetter, 780 F.2d 1158, 1163 (5th Cir. 1986); Brown v. District of Columbia, 638 F. Supp. 1479, 1487 (D.D.C. 1986). *But see* Myers v. Morris, 810 F.2d 1437, 1468-69 (8th Cir.), *cert. denied*, 108 S. Ct. 97 (1987). The terminology differs from case to case and includes gross negligence, callous indifference, wantonness, and recklessness.

106. Indeed, the Court has noted that such a situation should not result in a due process violation. *See* Parratt v. Taylor, 451 U.S. 527, 544 (1981) (disapproving any due process test under which "nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983").

107. *Daniels*, 474 U.S. at 328.

108. The Court has found state of mind requirements in the equal protection clause, under which the Court requires a showing of discriminatory intent before a plaintiff can prevail. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976). The Court also has found state of mind requirements in the eighth amendment's cruel and unusual punishment clause, violation of which must disclose deliberate indifference. *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976). These rights are distinguishable from the due process clause, however. In the equal protection analysis, the intent-to-discriminate requirement applies only to suspect classifications—a category of cases in which it is relevant. In virtually all equal protection cases, the government has the right to take the disputed action in the normal course of its activities; for example, legislative redistricting, firing an employee, denying a license, or terminating public benefits. It is solely the presence of discriminatory intent that distinguishes such proper action from action prohibited as invidiously discriminatory under the equal protection clause. Thus, it makes sense that an equal protection violation requires a discriminatory state of mind. In the eighth amendment analy-

III. UNDERSTANDING THE PROBLEM: CONSTITUTIONAL ADJUDICATION IN THE CONSTITUTIONAL TORT CONTEXT

Daniels and *Davidson* define the meaning of the word *deprive* in the due process clause and thus set the parameters for all forms of due process claims and for all types of judicial relief for due process violations.[109] Yet the Court's exclusive concern with requiring "abusive" states of mind is best explained as an attempt to address a different question: when should courts award damages for blameworthy behavior?[110] If the

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sis, as Justice Blackmun points out in his dissent in *Davidson*, the words *cruel and unusual punishment* suggest a state of mind requirement not present in the word *deprive*, especially when one notes that " 'torture[s]' and other 'barbar[ous]' methods of punishment" were the drafters' concerns in adopting the eighth amendment. *Davidson*, 474 U.S. at 354 n.3 (Blackmun, J., dissenting) (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)). Moreover, unless a specific barbarous type of punishment is at issue, the eighth amendment deals with prison *conditions*. It is only a pattern of actions and omissions that imply a deliberate indifference to a prisoner's plight that will be systematic enough to amount to a prohibited condition.

109. *See Davidson*, 474 U.S. at 348 ("As we held in *Daniels*, the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials."); *see also supra* note 9 (discussing the forms of due process).

110. Blameworthiness in constitutional torts is limited adequately by good faith immunity. Indeed, the Court could have decided *Daniels* and *Davidson* on the nonconstitutional ground of good faith immunity. Regardless of whether due process requires that guards pick up pillows, it is reasonable to hold that the law is not so clearly established, *see* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), that "a reasonable official would understand" that leaving pillows on stairs "violates that right." Anderson v. Creighton, 107 S. Ct. 3034, 3039 (1987). Although one could say that it is clear that guards should protect inmates from harm at the hands of other inmates, the Court's casting of the facts of *Davidson* as a mistaken belief "that the situation was not particularly serious," *Davidson*, 474 U.S. at 348, would seem to disclose a basis for holding that a good faith belief existed that no duty was involved. The parallel to *Anderson* is striking. In *Anderson*, a police officer conducted a warrantless search of the plaintiff's home in the mistaken belief that the plaintiff was harboring a bank robber. 107 S. Ct. at 3037. One could characterize *Anderson* as involving mirror-image mistaken belief that the situation was more serious than it was. 107 S. Ct. at 3039-40. If it is true that the application of good faith immunity would resolve the issue, then the holding in *Daniels* is not only erroneous, it is gratuitous. Of course, good faith immunity does not apply when plaintiffs sue governmental entities. *See* Owen v. City of Independence, 445 U.S. 622, 650 (1980). Consequently, anticipated difficulties with *Owen* in future cases naming entities may have been a reason that the *Davidson* Court ignored good faith immunity, thereby allowing it to construe the due process clause in a way that would limit liability regardless of applicable immunities. Fear of *Owen*, however, is irrational in cases such as *Daniels* and *Davidson*, where it would be rare that the random and unauthorized conduct causing the

Court adopts blameworthiness standards to determine whether the defendant has violated the Constitution, there will be superfluous doublecounting in damages cases and disastrous results in injunctive and declaratory actions.[111] There is no way to limit damages actions through a redefinition of constitutional rights without having that construction of the Constitution apply to injunctive suits as well. If the Court is to control damages cases without unintended side effects, it should control them either on a nonconstitutional basis or through use of a unified constitutional theory that fits all circumstances and contexts in which the constitutional issue will arise.[112]

Some salient features of constitutional tort cases such as *Daniels* tend to confound dispassionate constitutional analysis. Courts must resist these features if they are to avoid the mistakes of *Daniels*. First, most constitutional tort cases are actions for a *personal* money judgment against *individual* defendant officials. When a court considers the personal liability of officials—often relatively low-level and low-paid officers

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injury was required by official regulation, policy, or custom of the governing entity. *See* Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978).

111. Application of the good faith defense to injunctive and declaratory actions would freeze constitutional law in its current state, because good faith would allow relief only when the defendant knew or should have known that his actions would violate clearly settled constitutional doctrine. *See Harlow*, 457 U.S. at 818.

112. The Court's failure in *Daniels* to take into account the impact of the holding on mainstream procedural due process doctrine is not typical of its usually careful approach to constitutional adjudication. In this respect, the Court should heed the advice it offered the plaintiff in *Daniels*, when it quoted Chief Justice Marshall's famous admonition that "we must never forget, that it is a *constitution* we are expounding." *Daniels*, 474 U.S. at 332 (emphasis in original) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)). Constitutional tort cases meet a similar, grudgingly tolerant attitude in the lower federal courts. *See* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Case Load*, 1973 LAW & SOC. ORD. 557, 575-76; Coffin, *Justice and Workability:* Un Essai, 5 SUFFOLK U.L. REV. 567, 567-74 (1971); *infra* note 120. Academia also demonstrates a bias. The constitutional tort area is an orphan among academic areas. Torts teachers and scholars seem rarely to have the interest or background to struggle with the constitutional issues involved and regard the mainstream torts issues as relatively elementary. At the same time, constitutional teachers and scholars disdain the area as not involving sufficiently rich issues of constitutional policy and doctrine to be of interest. *But see* S. NAHMOD, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5 (1974); Whitman, *Constitutional Torts*, *supra* note 102, at 5 (examining costs of using constitutional rights as basis for damage awards); Whitman, *Governmental Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 225 (1986) [hereinafter Whitman, *Governmental Responsibility*] (evaluating problem of assessing institutional responsibility in constitutional tort cases).

with difficult jobs—concerns about fairness are natural.[113] When higher-level government officials are defendants, additional concerns include the chilling effect of damages awards on governmental decision making and on the overall attractiveness of public service.[114] Although the ultimate issue in constitutional tort cases may be whether the defendant officials should be liable in damages for their action toward the plaintiff, this question differs from whether the official's action violated the due process clause. The problem with *Daniels* is that the case asks the second question but the Court answers the first question.[115]

A second feature affecting a court's attitude toward constitutional issues in constitutional tort cases is the perception that the quality and quantity of constitutional tort cases have "cheapened the currency" of the Constitution. The Supreme Court clearly is not enamored of constitutional theories for the recovery of twenty-three dollar prisoner hobby kits[116] or even for more substantial damages from slip-and-fall or automobile accidents,[117] and complaints about excessive caseloads are well-

113. The defense of good faith immunity in actions against individual state officers takes these concerns into account. *See supra* note 110. Despite this, some members of the Court apparently do not believe that good faith immunity is enough protection. Justice Powell has come closest to concluding that, even in circumstances in which a court has determined that good faith immunity is inapplicable, "[c]ivil liability should not attach unless there was notice that a constitutional right was at risk." Pembaur v. Cincinnati, 475 U.S. 469, 495 (1986) (citing Procunier v. Navarette, 434 U.S. 555, 562 (1978)).

114. *See* Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974).

115. Interestingly, the Court in *Daniels* indicated that its reason for granting review was to provide guidance as to "when tortious conduct by state officials rises to the level of a constitutional tort." *Daniels*, 474 U.S. at 329. This statement of the issue does not immediately separate the constitutional issue from the damage liability issue. One commentator has even expressed the view that "*Daniels* and *Davidson* were not written as procedural due process cases" and has described the holding as only "implicitly" defining when procedural due process protections are due. *See* Whitman, *Governmental Responsibility*, *supra* note 112, at 273. Regardless of what the Court had in mind, however, the lower federal courts have taken *Daniels* to heart as the definitive constitutional decision it really is. *See, e.g.*, Franklin v. Aycock, 795 F.2d 1253, 1261 (6th Cir. 1986); Sourbeer v. Robinson, 791 F.2d 1094, 1105 (3d Cir. 1986), *cert. denied sub nom.* Patton v. Sourbeer, 107 S. Ct. 3276 (1987) (applying *Daniels* to *Goldberg v. Kelly*-type procedural due process situations).

116. *See* Parratt v. Taylor, 451 U.S. 527, 537 (1981).

117. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 328 (1986) (slip-and-fall). It may have been this factor that led Justices Marshall and Brennan, traditionally vigorous opponents of restrictive readings of the Constitution and § 1983, to vote as they did in *Daniels* and *Davidson*. Justice Marshall, although joining Justice Blackmun's dissent in *Davidson*, 474 U.S. at 349 (Blackmun, J., dissenting), concurred in the result without opinion in *Daniels*. 474 U.S. at 336

known.[118] Indeed, when some disfavored types of cases make their way to the Court, the Justices disagree only on the grounds for reversing them.[119] To many judges and justices, the application of constitutional provisions to lost hobby kits and slips and falls on pillows seems intuitively wrong.[120]

(Marshall, J., concurring). Justice Brennan concurred in the *Davidson* Court's conclusion that merely negligent conduct does not constitute a deprivation of liberty under the due process clause, although he did express agreement with Blackmun's dissent as to the application of the rule to the facts of *Davidson*. *See* 474 U.S. at 349 (Brennan, J., dissenting).

118. Of the justices who have voted consistently for positions that would limit § 1983 and the due process clause, Justice Powell has been the quickest to admit that the number of such claims is a large part of the problem. *See Parratt*, 451 U.S. at 550-51 (Powell, J., concurring). As Professor Whitman has pointed out, however, "to begin from caseload is to put things backwards." Whitman, *Constitutional Torts*, *supra* note 102, at 28. Moreover, Eisenberg and Schwab's recent study indicates that the statistics are not what they seem. *See* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987). They found that the data of the Administrative Office of United States Courts that is most often cited actually contains no distinct category for constitutional torts. *Id.* at 668. Of those cases classified as civil rights actions, half of the nonprisoner filings were title VII cases raising statutory violations. Moreover, the perception that there is a recent "flood" of constitutional tort cases is incorrect if one is referring to increases in the relative number of filings; nonprisoner civil rights filings declined from 1975 to 1984 as a percentage of total cases filed in the federal courts. Although the absolute number of filings in prisoner cases have increased relative to total filings, the federal courts do not spend much time on them. A 1979 study found that in 1976 the federal courts terminated 68% of the § 1983 actions filed by prisoners without any response from the defendants, that the federal courts dismissed most of the remaining cases before the pretrial conference, and that only 4.2% were tried. *See* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 618 (1979).

119. *See, e.g.*, *Parratt*, 451 U.S. at 543-46, 554 (agreeing unanimously to dismiss the case but with varying opinions).

120. With apologies to Justice Stewart, in recognizing a proper use of the due process clause, it is almost as if we "know it when we see it," *see* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), although there would undoubtedly be strong disagreement on closer cases. I probably owe a double apology to Justice Stewart, because his concurring opinion in *Parratt* was equally intuitive about the very problem at issue in *Daniels*. *See Parratt*, 451 U.S. at 544-45 (Stewart, J., concurring) (objecting that to hold loss of prisoner's hobby kit a deprivation would be "not only to trivialize, but grossly to distort the meaning and intent of the Constitution," but offering no doctrinal guidance for the future to distinguish trivial from nontrivial constitutional cases). Even when constitutional tort cases present intuitively nontrivial claims, they can seem less important than they should to federal judges who lack a special sensitivity to civil rights cases. Whether federal judges compare them with other tort cases or other injunctive constitutional cases on their docket, constitutional tort cases are likely to suffer by the comparison. Other tort cases generally will involve much more than the required minimum $10,000 in controversy (soon to be $50,000, *see* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201(a), 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 4642, 4646

A third complicating feature is that the due process clause forms the basis for many claims that seem to be personal injury or property damage claims "masquerading" as civil rights claims. The very breadth of the due process clause not only invites abuse, it invites comparisons with state tort law in a way that few other constitutional provisions do.[121] Such comparisons cause federal judges, concerned with swelling dockets, to wonder whether some of these cases should be in state court. Separating state law protection from due process protection, however, is difficult. State tort law generally affords a remedy for injuries to life, liberty, and property. Although the due process clause does not protect everything that state law protects,[122] state law often creates the rights that form the basis of the liberty and property interests that due process protects.[123] In the absence of any principle of limitation, therefore, all actions of state officials that have any identifiable consequences on a person have had the potential to become both actionable violations of the due process clause and state law claims.[124] The lack of a coherent theory to address which losses of life, liberty, or property are actionable as constitutional violations and which losses, if any, a state court should remedy, is at the center of the problem *Daniels* and its progeny have unsuccessfully sought to address.

(to be codified at 28 U.S.C. § 1332(a),(b))) and will entail some interstate aspects, while constitutional tort cases usually will involve a local dispute with much less at issue. *See generally* M. SCHWARTZ & J. KIRKLIN, *supra* note 8, § 14.13 (giving examples of § 1983 awards). Constitutional cases involving declaratory and injunctive relief most often will be class actions, *see* FED. R. CIV. P. 23(b)(2), and a federal judge therefore will perceive them as more important and more efficient—characteristics likely to appeal to the federal judge with a crowded docket. Injunctive actions generally also will be more pressing cases because, by definition, they present a need for court intervention to prevent irreparable harm. In addition, injunctive cases often will involve novel constitutional issues. By contrast, constitutional tort cases involve only individual plaintiffs and incidents that happened in the past and the constitutional issues therein are limited to clearly established constitutional doctrine, *see* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), that usually is decided in the process of formulating jury instructions.

121. *See supra* notes 18-20 and accompanying text.

122. *See* Paul v. Davis, 424 U.S. 693, 701 (1976) (holding that reputation interests, even if protected by state tort law, are not protectable liberty or property interests within meaning of due process clause).

123. *See* Hewitt v. Helms, 459 U.S. 460, 466-72 (1983) (drawing solely on state-created rights and expectations to find liberty interest in prison transfer); Vitek v. Jones, 445 U.S. 480, 487-94 (1980) (drawing on both state-created expectations and federal "stigma" interests in considering transfer of prisoner to mental hospital).

124. *See supra* text between notes 12 and 13.

The potentially endless scope of the due process clause make it natural for the Court to reach out and do something to limit it. Undoubtedly, this was a factor in the Court's decision in *Parratt* to redefine many previously substantive due process cases as procedural ones.[125] As it became clear that the *Parratt* solution was not workable,[126] pressure to find some other limitation undoubtedly played a part in the Court's hasty solution in *Daniels*. Because the reach of due process is so vast, however, it is difficult to tinker with one category of due process doctrine without having unintended side effects on other categories, or even, as in *Daniels*, unintended effects within the same category.[127]

There are two solutions to the problems that the *Daniels* state of mind test presents. The first would be to overrule *Daniels* and to include all random and unauthorized negligent personal injury and property damage by government officials within the ambit of the due process clause. It would not seem to be beyond the ken of due process to require government to provide a compensatory remedy whenever officials injure citizens even if the injury is negligently caused. The remedial requirements of *Parratt* and *Hudson* are not onerous. The Court has held that the required state procedure need not provide for punitive damages, jury trial, or attorneys' fees,[128] and lower federal courts have approved administrative remedies[129] and judicial remedies that provide only for recovery of the value of lost property and not for recovery of the property itself.[130] Moreover, applying *Parratt* and *Hudson* to such claims would create a rational division of labor between the federal and state courts that would be responsive to the Court's concern for overworked federal courts.[131] Cases involving personal injury or property damage that does not result from a violation of any specific substantive constitutional provision or of substantive due process[132] would be sent to state court in the first instance,

125. *See supra* notes 33-37 and accompanying text.
126. *See supra* notes 41-42 and accompanying text.
127. *See supra* notes 9-12 and accompanying text.
128. *Parratt*, 451 U.S. at 543-44.
129. *See, e.g.*, Oberlander v. Perales, 740 F.2d 116, 120 (2d Cir. 1984).
130. *See, e.g.*, Smith v. Rose, 760 F.2d 102, 106 (6th Cir. 1985).
131. *See supra* note 118 and accompanying text.
132. Although the Court has not specifically ruled on the question, the circuits are unanimous in the opinion that the *Parratt-Hudson* doctrine does not apply to claimed violations of substantive constitutional rights. *See* M. SCHWARTZ & J. KIRKLIN, *supra* note 8, § 3.9 (Supp. 1988) (showing table of decisions).

with federal courts getting involved only if states refused to provide the litigant with a minimally adequate compensatory remedy.[133] Although overruling *Daniels* so soon after the Court decided it would be somewhat embarrassing, *Parratt* was only five years old when the Court overruled it in *Daniels* on the very same due process state of mind question under discussion.[134]

On the other hand, applying even the minimal due process requirements of *Parratt* and *Hudson* to personal injury and property damage claims could have far-reaching implications. As the lower court opinions in *Daniels* indicated, under *Parratt* and *Hudson* a complainant could use the due process clause to eliminate state sovereign immunity as a defense to state law claims for damages suffered at the hands of state officials.[135] After all, the state procedures for obtaining compensation

133. The federal court's task in such an event is not onerous because a court can determine whether state law provides an adequate remedy as a matter of law without the need for an extensive trial. The lower court opinion in *Daniels* illuminates how a court handles the issue. *See* Daniels v. Williams, 748 F.2d 229, 232 (4th Cir. 1984), *aff'd*, 474 U.S. 327 (1986). Some judges have suggested that federal courts simply send the plaintiff to pursue state remedies, with the right to return to federal court in the event the state court refuses an adequate remedy. *See, e.g.*, Ausley v. Mitchell, 748 F.2d 224, 227 (4th Cir. 1984) (en banc) (Winter, Phillips, & Murnaghan, JJ., concurring in part), *cert. denied*, 474 U.S. 1100 (1986).

134. If the Court decides to take this route, there would be no need to resuscitate the adequate compensatory remedy aspect of *Parratt* and *Hudson*, because it is still in effect after *Daniels* to test the adequacy of state compensatory remedies for intentional or grossly negligent deprivations that fall short of substantive due process violations. There may be a need to find a better definition of the "random and unauthorized" distinction. For critical commentary on this matter, see Bandes, Monell, Parratt, Daniels & Davidson: *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 132-58 (1986) (suggesting that distinction produces tremendous confusion); Monaghan, *supra* note 16, at 994 (calling the line "unstable"); *see also* M. SCHWARTZ & J. KIRKLIN, *supra* note 8, § 3.8 (Supp. 1988) (discussing cases that address "random and unauthorized" distinction). There is also a need to bring the different forms of procedural due process closer together by applying the *Mathews v. Eldridge* factors to the question of when a post-deprivation remedy would satisfy due process and to the precise requirements for such a remedy. *See supra* note 91; *see also* Bandes, *supra*, at 134 (stating that "*Parratt* is not an application of, but an exception to, the *Mathews* balancing test").

135. *See supra* note 42 and accompanying text. This is distinct from the less controversial idea that state sovereign immunity would fly in the face of federal claims in state court. *See* Employees v. Department of Public Health & Welfare, 411 U.S. 279, 297-98 (1973) (Marshall, J., concurring); Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 239 (1981).

would not be adequate if the state allowed no hearing on the merits of the claim and no recovery.[136] In light of this possibility, it is not surprising that Justice Rehnquist's tack in *Daniels* was to beat a hasty retreat from *Parratt*.[137]

136. *See* M. SCHWARTZ & J. KIRKLIN, *supra* note 8; Smolla, *The Displacement of Federal Due Process Claims By State Tort Remedies:* Parratt v. Taylor *and* Logan v. Zimmerman Brush Company, 1982 U. ILL. L. REV. 831, 871-81; cases cited *supra* note 42. *But see Daniels*, 474 U.S. at 342-43 (Stevens, J., concurring); Whitman, *Governmental Responsibility*, *supra* note 112, at 274-75. In Justice Stevens's view, the bar of sovereign immunity would not render state remedies inadequate even though all chance of recovery is foreclosed. The standard that he would impose would be whether invocation of the doctrine of sovereign immunity renders a state's "*remedial system* . . . constitutionally inadequate," meaning "fundamentally unfair," rather than whether the claimant would have a fair chance of recovering in the particular case. 474 U.S. at 343 (emphasis added). In *Daniels*, Justice Stevens reasoned that state tort systems defeat recovery for many reasons, including contributory negligence and statutes of limitations, and that sovereign immunity is no different. *Id.* The problem with this approach is that it applies an aggregate, system-wide fairness test to a question that courts should judge, and always have judged in the past, as a matter of individual fairness. For example, suppose a state with a predeprivation hearing system, as required by *Goldberg v. Kelly*, were to pass a law depriving its hearing officers of the power to decide the legality of welfare terminations on the ground of sovereign immunity. Would this violate due process or would it be, in Justice Stevens's words, a state's "mere . . . elect[ion] to provide [itself] with a sovereign immunity defense in certain cases [that] does not justify the conclusion that its remedial system is constitutionally inadequate?" *Id.* at 342. The chances are extremely low that any one due process lawsuit ever will include so many types of claims that denial of the protections sought in that suit would infect the fairness of the state's entire remedial system. Under an aggregate test, a state can deny the right to hearings so long as the categories of cases affected are small and the state does not prune procedural protections from too many areas at once. *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 434-35 (1982) (noting that state statute of limitations would violate due process if it created unacceptable risk that too many meritorious claims of a *particular type* would be barred). There may be problems in deciding where to draw the line among various limited defenses to compensation claims, such as contributory negligence, statutes of limitations, good faith immunity, and punitive damage immunity. Due process does not require that the plaintiff invariably win in the state forum or win all that he would otherwise get under § 1983. Perhaps a nondiscrimination rule could be applied under which defenses at a post-loss hearing would not violate due process if the defense would apply to analogous claims against private tortfeasors. *Cf.* Felder v. Casey, 108 S. Ct. 2302, 2310 (1988) (holding that state notice of claim statute requiring administrative notice to defendant municipality as a prerequisite to filing in state court cannot be applied to § 1983 action filed in state court, reasoning that no similar requirement applies when nongovernmental defendant is sued). In whatever manner close cases might be decided, the complete denial of *any* opportunity to obtain compensation against a government actor under *any* circumstance that sovereign immunity entails would not seem to be a difficult case to call.

137. An additional indicator that the Court is unlikely to overrule *Daniels* is Justice Brennan's agreement with *Daniels*'s negligence holding. *See* 474

The second possible solution to the problems that the Court's state of mind test presents is to draw a line between constitutional and ordinary state-law torts, but to draw it in a way that makes more sense. The next section addresses this alternative.

IV. UNDERSTANDING THE SOLUTION: DEVELOPING A CONSTITUTIONAL THEORY OF DUTY

Daniels and other decisions seeking to limit the reach of due process share the notion that there is something wrong with invoking the due process clause in claims involving certain kinds of injuries, such as lost hobby kits and slip-and-fall incidents. In essence, this notion embodies the ideas that the due process clause protects against only a limited field of risks and that many of the personal injuries and property losses that have arisen in the cases are outside the scope of those risks. The idea of a limited scope of risks is familiar in tort law and is embodied in the concept of duty.

A. THE ROLE OF DUTY IN TORT LAW

The concept of duty in torts deals with the "problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other"—an obligation "to conform to a particular standard of conduct toward another."[138] Unless the defendant owes a duty to the plaintiff to conform to an identified standard of conduct, the defendant's actions cannot result in liability.[139] Stated another way, the defendant is liable only if the risk of injury to the plaintiff is within the scope of some duty that the defendant owes to the plaintiff. Duty is a formidable limitation on the liability of a defendant for conduct that concededly has caused harm to the plaintiff.

The tort law duty that is most relevant to defining the scope of constitutional tort duty is the duty arising from statutes. Under this familiar tort law rule, conduct in violation of a

U.S. at 349 (Brennan, J., dissenting); *supra* note 51. *Cf. supra* note 117 and accompanying text.

138. PROSSER & KEETON, *supra* note 49, § 53, at 356. This definition of *duty* is not limited to negligence or to torts. *See infra* notes 232-41 and accompanying text.

139. As one commentator has noted, there is no such thing as "negligence in the air." F. POLLOCK, THE LAW OF TORTS 450 (8th ed. 1908). Lord Esher observed: "A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." Le Lievre v. Gould, 1 Q.B. 491, 497 (1893). *See* PROSSER & KEETON, *supra* note 49, § 53, at 356-59.

regulatory statute is wrongful *per se*.[140] The statutory duty has limitations, however, and when the legislature has only a limited purpose in enacting a statutory standard of conduct, violation of the statute will constitute a basis for civil liability in a particular case only if the statute was intended to protect against the precise harm suffered in that case.[141] Thus, it is only if the scope of the risks that the statute protects against includes injuries like the complainant's that the duty embodied in the statute extends to that injury.[142]

The classic case illustrating this principle is the English case of *Gorris v. Scott*.[143] In *Gorris*, an act of Parliament required ship owners transporting animals on ships destined for England to confine the animals in separate pens.[144] Because the defendant failed to place the plaintiff's sheep in such pens, the sheep washed overboard.[145] The plaintiff argued that the court should impose liability because the conduct was in violation of the statutory command.[146] The court held that the statute was irrelevant because the purpose of the requirement was to prevent disease among the animals, rather than to secure them from washing overboard.[147] The risk of loss from the sheep washing overboard was not within the scope of the risks that the legislature intended to address. Consequently, because the duty embodied in the statute did not extend to this plain-

140. PROSSER & KEETON, *supra* note 49, § 36, at 229-31. Courts deem the conduct to be either wrongful *per se* or presumptively wrongful.

141. *Id.* § 36, at 225.

142. By contrast, duty as a limitation on liability for breach of *common-law* standards of conduct becomes an issue when questions of liability for unforeseeable consequences and to unforeseeable plaintiffs arise. *See, e.g.*, Palsgraf v. Long Island R.R., 248 N.Y. 339, 341-43, 162 N.E. 99, 99-101 (1928) (Cardozo, J.) (discussing liability in terms of duty); *see generally* PROSSER & KEETON, *supra* note 49, §§ 43, 53 (discussing duty and its scope in tort law); Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1023-35 (1928) (discussing various duty tests); Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 43-47 (1962) (applying concept of duty in selected unforeseen injury cases). It is in resolving problems of foreseeability with respect to common-law liability that duty has been criticized as "a shorthand statement of a conclusion, rather than an aid to analysis." PROSSER & KEETON, *supra* note 49, § 53. In this respect, duty has had some competition from proximate cause. *See, e.g., Palsgraf*, 248 N.Y. at 349-53, 162 N.E. at 101-05 (Andrews, J., dissenting) (discussing liability in terms of proximate cause). Fortunately, the problem of limiting the scope of *constitutional* tort duties does not involve determining the foreseeability of the injury to the plaintiff.

143. 9 L.R.-Ex. 125 (1874).

144. *Id.*

145. *Id.* at 126.

146. *Id.* at 125-26.

147. *Id.* at 127-28 (opinion of Kelly, C.B.).

tiff's loss, the court did not hold defendant liable even though his conduct in violation of the statute caused the loss.[148]

It is important to note that the *Gorris* court still could have held the defendant liable for the loss if the defendant's conduct had violated a common-law duty to take reasonable steps to secure the animals from washing overboard. In other words, there can be two distinct and separate duties imposing essentially the same standard of conduct.[149] Whether a common-law duty or a statutory duty is involved when a defendant violates a standard of conduct depends on the nature of the injury resulting from the conduct and on whether that injury is a risk against which the duty protects.[150]

B. THE ROLE OF DUTY IN CONSTITUTIONAL TORTS

The Constitution assigns rights in individuals and duties on the government. Duties imposed by the Constitution, similar to those in ordinary tort law, address the "problem of the relation between" the government and its citizens and impose on the government "a legal obligation for the benefit of" those citizens.[151] Whether negative or positive terms define the duties

148. *Id.* at 129-30 (opinions of Kelly, C.B. & Pigott, B.). Another often-cited case involved a factory law requiring that dangerous machines and elevators have guards stationed near them. In a suit for damages by a nonemployee injured because of the failure to post such guards, violation of the statute was not negligence *per se* because the court held that the duty extended only to the risk of injury to employees. *See* Alsaker v. De Graff Lumber Co., 234 Minn. 280, 282-83, 48 N.W.2d 431, 433 (1951); PROSSER & KEETON, *supra* note 49, § 36, at 224.

149. *See Gorris*, 9 L.R.-Ex. at 130-31 (opinion of Pollock, B.). The court in *Gorris* did not consider the common-law theory because the parties did not raise it. *See id.* at 131. In the example of the duty to post guards, *see supra* note 148, although there was no duty under the statute to the nonemployee, the failure to station guards near hazardous areas could violate a common-law duty to keep the premises reasonably safe for all who are legally on the premises. If a statutory duty is applicable, the plaintiff will, of course, prefer that route to liability over the more general common-law duty route.

150. Just as common-law and statutory duties can overlap, two different common-law duties can overlap as well. The example of handing a loaded gun to a child illustrates this. *See* PROSSER & KEETON, *supra* note 49, § 43, at 283; RESTATEMENT (SECOND) OF TORTS § 281, comments e, f and illustration 3 (1965). If the injury that results is not from the gun discharging but from it being dropped on a foot, then the injury is probably beyond the scope of the defendant's duty to use care in the custody and control of loaded firearms, the principal risk from which is the danger that they will cause injury by discharging. The conduct, however, is also a breach of the duty not to hand heavy objects to children (which would apply equally to bricks and guns), because the injury that resulted is precisely the danger against which that duty protects.

151. PROSSER & KEETON, *supra* note 49, § 53, at 356, quoted in full *supra*

and whether they arise in injunctive or damages actions, a court considering a constitutional claim must determine at some point the scope of the constitutional duty involved.[152]

The Constitution, like the regulatory statutes just discussed, imposes a more limited set of duties than does the common law. Like statutes, which intervene interstitially against the backdrop of the common law to limit certain conduct only in those areas in which the legislature saw some particular need for regulation, the Constitution addresses limited concerns and limited sets of relationships.[153] The Constitution is concerned with only one overall relationship: that between the government and the governed. Even then the Constitution does not concern itself with all aspects of that relationship. It does not provide a comprehensive manual for government operations. It deals only with those areas that the framers of the

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text at note 138. Several different standards of conduct are included in due process duties although one could describe each of them as requiring the government to afford due process. *See infra* note 166.

152. Courts and commentators commonly describe the Constitution as a "charter of negative liberties" that does not impose any duties to take affirmative action. *See, e.g.*, Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.). Although this may be true of the police services at issue in *Bowers*, it is not true of the Constitution in general. It may be, however, that most affirmative constitutional duties are enforceable only after the government has taken some other action. For example, the affirmative duties to obtain a warrant or to provide process arise only when the government seeks to search an individual or to deprive the individual of liberty or property. Thus, these constitutional duties are not so much affirmative duties as they are conditions on negative duties. This, however, simply points out the truism that duties are not enforceable except in situations to which they are applicable. It remains true that at some point in the government's dealings with a citizen, affirmative duties that the Constitution compels will arise. There is reason to believe that constitutional tort cases will involve affirmative constitutional duties more frequently than constitutional cases seeking injunctive or declaratory relief. This is so because constitutional tort cases invariably deal with awarding damages based on past, completed conduct. Consequently, they are more likely than injunctive cases to involve situations in which a government actor has satisfied the factual predicates for affirmative constitutional duties. For example, the view that procedural due process imposes only negative duties is easier to sustain in an injunctive action in which the court, instead of ordering affirmatively that hearings be provided, simply enjoins the state from taking any depriving action unless it first provides a hearing. It is harder to say that no affirmative duty is involved in the corresponding damages action, in which the deprivation irrevocably has taken place and the court is awarding damages for the defendant's failure to comply with an affirmative constitutional duty to provide prior notice and a hearing.

153. *Cf.* H. HART & H. WECHSTER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953) ("Federal law is generally interstitial in nature. It rarely occupies a legal field completely . . . Congress acts . . . against the background of the total corpus juris of the states . . . .").

Constitution believed were especially important or would be especially problematic. Thus, like the duties that regulatory statutes impose in tort law, constitutional duties protect only against some of the risks that attend interaction with the government. When a plaintiff uses the due process clause, therefore, a loss must not only involve life, liberty, or property, but also must be of a type that is within the scope of the risks against which it is the purpose of the process to protect.[154]

Common-law duties arise in virtually all relationships and protect against most risks of loss, with "foreseeability" being the primary limit on those duties.[155] Consequently, just as there is potential overlap in coverage between common-law and statutory duties,[156] overlap of common-law and constitutional duties also is possible. Further, because the range of constitutional duties is much less comprehensive, official conduct most often will violate a common-law duty but not a constitutional one.

The question presented in *Daniels* and the cases leading up to that decision is: when does the government actor's conduct breach only a *common-law* duty and when does it breach a *constitutional* duty? A court can answer this question only by separating the duties and allowing claims under the Constitution only to the extent that they involve breaches of a constitutionally-secured duty, irrespective of whether the challenged conduct also might violate some common-law duty.[157]

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154. To the extent that contemporary understandings about the liability of public officers lend some legitimacy to a scope analysis, one should note the following passage from a treatise published around the time Congress ratified the fourteenth amendment:

> It is a general rule, that wherever an action [against a public officer] is brought for a breach of duty imposed by statute, the party bringing it must show that he has an interest in the performance of the duty, and that the duty was imposed for his benefit. Thus where a statute required a postmaster to publish a list of uncalled for letters in the newspaper having the largest circulation, a publisher of such a paper has not, as such, a sufficient interest in the performance of the duty, to give him a right of action against the postmaster for its non-performance. The object of such a statute is rather to benefit those to whom letters are, or may be, addressed, than the publishers of newspapers.

T. SHEARMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 174 (New York 1869).

155. *See supra* note 142.

156. *See supra* notes 149-50 and accompanying text.

157. Justice Harlan, concurring in Monroe v. Pape, 365 U.S. 167 (1961), suggested a similar theory about the relationship between constitutional and common-law torts. He speculated that the Congress that passed § 1983 wanted courts to allow plaintiffs to recover for actions of state officials that violated

The Court in *Daniels* seems to hint that the real problem is a duty problem, but fails to carry through and solve it. The Court emphasizes the limited scope of the Constitution's commands, observing that "[o]ur Constitution deals with the large concerns of the governors and the governed" and not with "injuries that attend living together in society."[158] The Court also states that "[t]he only tie between the facts of this case and anything governmental in nature is the fact that respondent was a sheriff's deputy at the Richmond City jail and petitioner was an inmate confined in that jail,"[159] carefully pointing out that "the Due Process Clause . . . *speaks to some facets of this relationship*" but not to all.[160] Thus, the Court seems to suggest the rudiments of a duty analysis. The Court attempts to distinguish between fields of risks defined by the Constitution and the common law and holds that the constitutional duties that attach to the jailer-inmate relationship are limited in their scope, do not cover every aspect of that relationship, and do not cover the risk of the particular injury the plaintiff suffered.[161]

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both state law and the Constitution because Congress thought "that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Id.* at 196 (Harlan, J., concurring). This doctrinal independence of the common-law and constitutional duties renders any overlap in remedies between them a matter of the "purest coincidence." *Id.* at 196 n.5 (Harlan, J., concurring). Justice Stewart, who joined Justice Harlan's concurrence in *Monroe v. Pape*, hinted at the same theory in his concurrence in *Parratt*, when he observed that it is "extremely doubtful that the property loss here . . . is the kind of deprivation of property to which the Fourteenth Amendment is addressed." *Parratt*, 451 U.S. at 544 (Stewart, J., concurring); *see supra* note 120.

158. *Daniels*, 474 U.S. at 332.

159. *Id.*

160. *Id.* at 333 (emphasis added). The Court suggested that similar problems existed in relationships in other cases in which the Court found no constitutional violation. *See supra* note 103.

161. Of the other cases in which the Court has struggled with the limits of the due process clause, it has avoided an explicit duty analysis. In Baker v. McCollan, 443 U.S. 137 (1979), the term *duty* was not used and the Court only stated its conclusion that "a sheriff executing an arrest warrant is [not] required by the Constitution to investigate independently every claim of innocence," although the common-law tort of false imprisonment may require it. *Id.* at 145-46. The Court made no attempt to justify this conclusion in terms of any limitation on duty embodied in the due process clause. In Martinez v. California, 444 U.S. 277 (1980), the Court backed into the duty issue by dealing with the question in terms of causation, holding that the parole board's release of the killer did not proximately cause the death of the plaintiff's decedent. *Id.* at 281; *see also infra* note 255 (discussing *Martinez*). In a case decided just as this Article was going to print, the Court engaged in a more explicit duty

Recast in duty terms, the problem in *Daniels* is not, as the Court says, that the defendant's conduct evinced only a "lack of due care;"[162] instead, there was "no care due," or at least no duty of care imposed by the Constitution. Although the defendants in *Daniels* and *Davidson* caused the injuries, and those injuries were within the broad category of liberty and property, the interests were not within the scope of the risks against which the due process clause protects and thus were not deprivations. They may have been within the scope of some traditional common-law duty, but they were not within the scope of a constitutional duty.

C. APPLYING THE LIMITED DUTY CONCEPT

Determining the extent and scope of constitutional duties, as distinguished from any applicable common-law duties, is difficult. The best way to separate the two types of duty is similar to the method general tort law employs to distinguish violations of statutory duties: a court must construe the due process clause and determine what risks of injury the constitutional provision guards against.[163] Ultimately, to use the words of

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analysis. In DeShaney v. Winnebago Dept. of Social Servs., 108 S. Ct. 998 (1989), the Court held that a child who was not removed from his father's custody by the defendant welfare workers could not sue for violation of due process because there was no "affirmative duty to protect" him based on knowledge of his predicament. Only if the danger were the result of an act of the defendants or other government actors would such a duty arise. *Id.* at 4221. *See infra* notes 210-19 and accompanying text.

162. *Daniels*, 474 U.S. at 330, 332.

163. A court need not consult any applicable legislative history in the case of the due process clause. Whatever the framers intended the due process clauses of the fifth or fourteenth amendments to mean, they felt that it was so obvious as not to merit much substantive discussion. It is conceded by all that the due process clause's origins are found in Chapter 39 of Magna Charta as interpreted by statutes passed during the reign of Edward III. *See* Corwin, *The Doctrine of Due Process Before the Civil War*, 24 HARV. L. REV. 363, 368 (1911). *See also* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1856). Before the federal Constitution was ratified, many state constitutions had due process clauses. *See id.* at 276; 24 HARV. L. REV. at 368. The Madison Resolution offered in the amendment process leading to the Bill of Rights contained a due process clause, as did resolutions of the Virginia and New York Conventions. *See* IV DOC. HISTORY OF THE FIRST FEDERAL CONG. 10, 16, 20. The due process clause of the fourteenth amendment was copied from the fifth amendment. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1865) (Rep. Bingham). *See also* Adamson v. California, 332 U.S. 46, 93-94 (1947) (Black, J., dissenting). Unfortunately, in no place during the process leading up to the adoption of the due process clauses of either the fifth or the fourteenth amendment is there any helpful discussion of its meaning.

Wells and Eaton apply a policy extrapolation from the due process clause

Daniels, the problem is to determine what "concerns" the due process clause addresses, which "facets of [the] relationship" between "the governors and the governed" are ones that due process will "speak to."[164] In separating the constitutional and common-law fields of risks, the question is not which risks are more or less weighty or important. As the Court notes in *Daniels*, "[i]t is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns."[165] Thus, the Court should concern itself with *types* of risks and concomitant duties, not with their levels.[166]

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to the problem of the boundaries of constitutional torts. Wells & Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. MICH. J.L. REF. 1 (1982). Borrowing from Dworkin, they determine that the true focus of due process is "care" and "concern" from government officials. *Id.* at 31-41. They apply those concepts to determine when government omissions would violate due process duties spun from the "care" and "concern" concepts.

164. *Daniels*, 474 U.S. at 332-33.

165. *Id.* at 333. Despite this comment, the Court's opening statement of the issue it would decide, "when tortious conduct by state officials *rises to the level* of a constitutional tort," is more hierarchical. *Id.* at 329 (emphasis added); *see also* Shapo, *supra* note 2, at 327 (suggesting that conduct comprising constitutional torts should be more egregious than in the "garden variety state tort action").

166. Before discussing the kinds of injuries that will activate due process duties, it is helpful to examine the substantive content of the duties imposed, or in the words of the Court, to examine what the Constitution *says* once it "speaks to" a particular facet of the relationship between the plaintiff and the defendant. *See supra* text accompanying note 164. The overall answer is that the Constitution requires that the state afford due process, but this means something different in each of the four categories of due process. *See supra* notes 9-12 and accompanying text. For the substantive strains of due process, the government may not *cause* the loss regardless of how fair or extensive the procedural safeguards may be. These categories of due process cases—which more appropriately might be labelled "no process" rather than "due process"—require that the government not inflict the loss at all. Procedural due process is more complicated, because there are two constituent parts to the violation (deprivation and absence of process), because two different government actors may be involved in the violation, and because the duties are different for random and unauthorized conduct. The overall procedural due process duty of the government, or of an official performing both the role of depriver and process afforder, is to refrain from inflicting the loss or to provide appropriate procedural protections, either before or after the loss, depending on the circumstances. When the Court requires pre-loss protections, the depriver's duty is not to inflict the loss at all if the state has provided no such protections and the process afforder's duty is to provide those protections whenever the government proposes to deprive anyone of life, liberty, or property. When the state must afford post-loss process, the depriver's duty will vary, depending on whether the loss is one that the state can anticipate or is a random or unauthorized action. If the state can anticipate the loss, the duty is not to cause the loss unless the state will provide procedures for contesting its

The Court in *Daniels* emphasized that the "touchstone" of the due process clause is "to secure the individual from the arbitrary exercise of the powers of government."[167] This phrase is a useful one on which to build a theory of duty, assuming that *arbitrary* encompasses considerations of fairness as well as abuse[168] and that the remainder of the phrase limits its applicability to arbitrary action that takes place in the context of a governmental power relationship between the parties.[169] With these qualifications, the notion emerges that a loss, to be within the scope of any due process duty and thus to constitute a deprivation must meet two requirements: first, the loss must be caused by a government official or entity enjoying a position of governmental power in general over the injured party or persons in the injured party's position, and second, it must take place in the process of that official or entity exercising or at-

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legality after the fact. If the loss is random and unauthorized, so that the state cannot anticipate it, there is no point in imposing a duty to refrain from inflicting the loss; if the state does not afford process, the depriver's constitutional duty is to pay compensation for the loss. The duty on the process afforder is to provide an adequate post-loss procedure so that the victim can obtain compensation.

167. *Daniels*, 474 U.S. at 331 (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819)). The Court also suggested that the interactions between the parties that resulted in losses were not "governmental in nature." *Daniels*, 474 U.S. at 332-33 (also citing Estelle v. Gamble, 429 U.S. 97, 106 (1976) and Baker v. McCollan, 443 U.S. 137, 146 (1979)). This suggestion is too general to be of much assistance. Moreover, it sounds very much like the widely criticized "governmental" versus "proprietary" distinction employed to decide whether sovereign immunity applies to government activities, a test that has proved to be indeterminate. *See* PROSSER & KEETON, *supra* note 49, § 131, at 1053-54. Although many states use the governmental-proprietary test in their sovereign immunity law, the Supreme Court has refused to use it to define federal sovereign immunity, *see* Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955), to define state eleventh amendment immunity, *see Ex parte* New York, 256 U.S. 490, 500-03 (1921), or to determine the state sovereignty limits expressed in the tenth amendment, *see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545-46 (1985). This does not mean that there are not certain advantages to using a governmental/proprietary distinction even with its faults. If the distinction were used to define both the extent of states' sovereign immunity and the scope of due process violations, a certain symmetry would result. Assuming that a state which barred any remedy on grounds of sovereign immunity would violate the *Parratt* duty to provide an adequate compensatory remedy, *see supra* note 136 and accompanying text, application of the governmental-proprietary test to expand a state's sovereign immunity in state court would result in a mirror-image expansion of its due process exposure in federal court, and application of the test to contract its sovereign immunity in state court would result in a limit on its due process exposure in federal court.

168. *See supra* notes 67-91 and accompanying text.

169. *See supra* notes 101-08 and accompanying text.

tempting to exercise such power over the injured party. The first requirement recognizes that unless the defendant official has the requisite governmental authority over the plaintiff, exercise of that authority is an impossibility. The second requirement assures that the defendant brings that authority to bear in some way.

To apply this test, it is essential to determine when an interaction between a government and its citizens involves an exercise of governmental power. A person having power over another has "the ability to wield coercive force" over that person.[170] When governmental authority supplies a basis for this ability, the power is governmental. The mere fact that the defendant works for the government does not mean that an injury caused by that employee involved an exercise of power. Many government employees engage in conduct that does not involve any significant exercise of power over others.[171] Other employees do have the authority to exercise power over others and thus have the potential to engage in "depriving" conduct.[172] Even if power is involved, it must be *governmental* power for there to be any deprivation. This requires a close examination of interaction between the government action and the injured party.[173] Interactions between citizens and government actors

170. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1779 (1986).

171. For example, most aspects of building and maintaining roads, government buildings, and parks, handling payroll, operating computers, providing medical services, and repairing and driving government vehicles involve no exercise of power over others. To the extent that they do, due process duties will apply. Condemning property to build roads, reducing an employee's salary, providing involuntary in-patient psychiatric care, and firing a truck driver are all examples of the exercise of governmental power.

172. Even police officers and welfare caseworkers perform tasks that do not involve the exercise of power over others. When they perform those tasks, their conduct is not subject to due process constraints, regardless of what injuries they cause. Furthermore, police officers may claim the protections of the due process clause if a state actor, in the process of exercising power over them, causes the loss of their liberty or property.

173. Monroe v. Pape, 365 U.S. 167 (1961), provides a phrase that may be useful. *See supra* note 1 (discussing *Monroe*). Although obviously intended as an expanding rather than a limiting concept and directed to the state-action issue, the Court in *Monroe* referred to the kind of conduct of a state official that would be actionable as "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe*, 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) (pointing out differences between fourth amendment violation and ordinary trespass case); *infra* note 187 (discussing *Bivens*). *Monroe*'s shorthand statement may be too narrow, however, because it implies that the conduct has to be "possible *only because*" of the official's

with power over them seem to fall into two categories: formalized and non-formalized.

1. Formalized Interactions: Uniquely Governmental Means and Governmental Benefits

Some interactions between officials and civilians have "built-in" governmental power dynamics. Losses in these cases are so uniquely within the province of government that we immediately recognize them as products of the exercise of governmental power. For example, denying a prisoner's good-time credit,[174] executing an arrest or search warrant,[175] holding prisoners for trial,[176] or passing or enforcing a statute criminalizing abortion[177] are not deprivations that a private person could cause. Other losses parallel those commonly encountered in private interactions but take on a different cast when the government causes them. Examples of these actions would include termination of welfare benefits,[178] public school expulsion,[179] public employment dismissal,[180] and public housing eviction.[181] These losses can be distinguished from their nongovernmental counterparts that private benefactors, schools, employers, and landlords cause by the fact that "[t]he government as landlord is still the government."[182] There are two reasons that these actions involve exercises of *governmental* power. First, the benefits owe their existence solely to the government. Only a

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authority. *Monroe*, 365 U.S. at 184 (emphasis added). A mixture of governmental and private power enters into every official interaction between a citizen and a state officer. *See infra* text accompanying notes 184-88.

174. *See* Wolff v. McDonnell, 418 U.S. 539, 553-55 (1974). *Wolff* is discussed in *Daniels*, 474 U.S. at 333-34, as an example of action clearly within the sweep of due process protections, but for different reasons than those offered here.

175. *See* Malley v. Briggs, 475 U.S. 335, 340-41 (1986).

176. *See* Gerstein v. Pugh, 420 U.S. 103, 111-116 (1975).

177. *See* Roe v. Wade, 410 U.S. 113, 152-56 (1973).

178. *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

179. *See* Goss v. Lopez, 419 U.S. 565, 574-76 (1975).

180. *See* Board of Regents v. Roth, 408 U.S. 564, 572-75 (1972).

181. *See* Thorpe v. Durham Hous. Auth., 386 U.S. 670, 671 (1967) (per curiam).

182. *Id.* at 678 (Douglas, J., concurring):

> It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment. "The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process."

Id. (citing Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955)).

person who possesses the requisite governmental authority to activate the administrative mechanism set up to terminate eligibility officially can cause such a loss. Although private persons could steal a benefit check or evict someone from public housing, it is only the government that officially can terminate eligibility and take these benefits away. Second, the loss is caused in the context of a formalized power relationship. Because the law formalizes the relationship, action taken within the purview of that relationship is an exercise of governmental power.[183]

2. Nonformalized Governmental Power Interactions

Identifying governmental power elements is more difficult in interactions between government officials and civilians that are more free-form and occur outside a formalized governmental power structure.[184] Consequently, in an unstructured interaction, it is difficult to determine whether the official caused the citizen's loss while in the process of exercising governmental power.[185]

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183. This does not mean that a government official who uses nonformalized means of causing a deprivation, such as physically wresting a check from a welfare recipient or evicting someone without process, does not cause a deprivation. *See infra* text accompanying notes 184-88.

184. All of the cases in which the Court has struggled with the line between common-law and constitutional torts fall into this category. *See supra* notes 21-44 and accompanying text.

185. *Parratt* established a category resembling the one developed here. It drew a line between "random and unauthorized" deprivations that are "not a result of some established state procedure" and deprivations of the *Goldberg v. Kelly* type. The Court in *Parratt* held that pre-loss procedural protections are out of place in the former category. *Parratt*, 451 U.S. at 541; *see supra* notes 34-36 and accompanying text. *Parratt*'s categorization, however, does not consider the possibility that pre-loss protections are *not* out of place for random and unauthorized deprivations that *are* a result of, or at least take place in the context of, some established state procedure, such as the negligent termination of welfare benefits previously presented in the modified *Goldberg v. Kelly* hypothetical. *See supra* notes 92-94. Perhaps a large part of the problem with *Daniels* is that it accepts this definitional error from *Parratt*. An additional problem with making the quality of procedural protections turn on whether the deprivation is the result of an established state procedure is that this method may be circular. Many random and unauthorized deprivations are simply actions that no federal court has yet required to be regularized. For example, courts have held that due process requires welfare administrators to establish a regularized procedure for the administration of local general assistance programs instead of determining eligibility on an ad hoc basis. *See, e.g.*, Daniels v. Woodbury County, 742 F.2d 1128, 1134-35 (8th Cir. 1984) (stating that "County may not arbitrarily and capriciously deny" welfare benefits "by lodging unlimited discretion in the hands of the decision-maker"); Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978) (holding that denial of welfare benefits

The rule should be that, if a government actor causes a loss after focusing official attention on an individual, the actor causes the loss in the process of exercising governmental power. Moreover, if the official enjoys a position of authority over persons in the plaintiff's position, courts should consider *any* focus of attention on the plaintiff by that official a focus of official attention. The reason for these presumptions is found in the reality of one-on-one confrontations between civilians and government officials who have power.[186]

Governmental authority plays a role in any focused interaction in two complementary ways. First, the knowledge that the official possesses authority over him or her inhibits the plaintiff's ability to resist the exercise of power. When a police officer roughs up an ordinary citizen, the citizen knows that resisting an assault by a police officer is different from resisting anyone else. Because the officer has superior weaponry and training, resistance is not only futile, but may also be used as the basis for a charge of resisting arrest. A citizen who manages to escape knows that the officer can mobilize government resources to find an escapee. Confrontation with a person identified as having the badge of governmental authority therefore has an undeniably undercutting and weakening effect on anyone facing that official.[187]

"without any standards and in an arbitrary and capricious manner" violates due process); White v. Roughton, 530 F.2d 750, 753-54 (7th Cir. 1976) (holding that procedure "vesting virtually unfettered discretion" to deny benefits in welfare officials violates due process); *see also* Leading Cases, *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 100, 149 (1986) (suggesting that *Davidson*, unlike *Daniels*, involved deprivation that the state could have anticipated and controlled and for which there was an applicable state procedure).

186. In this respect, of all the aspects of the power test discussed so far, the focus of official attention requirement comes closest to a state of mind requirement. Unlike *Daniels*, however, the intent, which has nothing to do with what is actually in the mind of the official, is intent to exercise governmental power, not to cause the particular injury. *See supra* note 49.

187. As the Court observed in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), with respect to federal officials:

> An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.
>
> . . . [W]e may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. . . . A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. But one who demands admission under a claim of federal authority stands in a far different position. The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to

The second way that the badge of authority plays a role in a focused interaction is by facilitating the conduct of the defendant official. Unlike the first way, this effect is not dependent on the plaintiff's knowledge of the putative depriver's official position. Rather the effect flows directly from the existence vel non of the authority and the *official's* knowledge of the extent of the authority. That authority may make uniquely governmental methods of injury available, such as the option of throwing the victim in jail. It may also greatly facilitate the use of instruments of injury that are less uniquely governmental—guns and clubs—by making them readily available for immediate use. Perhaps the badge of authority facilitates a government official's depredations most significantly by means that are less tangible than supplying instruments. The mere fact of the officer's authority is emboldening. Official wrongdoers do not worry as much as nonofficial wrongdoers about interference, whether it comes from private or official sources. A curt "Police business, please move along" will send on their way all but the most unusual civilian bystanders and most police officers would not worry greatly about interference from fellow officers. Even in the absence of *actual* use of an official position to facilitate official depredations, the knowledge that the badge of authority is there to use should it become necessary has a facilitating effect.[188]

D. A COMPARATIVE APPLICATION OF *DANIELS* AND THE POWER THEORY OF DUTY

1. Formalized Interactions

The results of applying the *Daniels* state of mind test to in-

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the local police; and a claim of authority to enter is likely to unlock the door as well.

Id. at 392, 394 (citations omitted). Of course, the inhibitions against resisting authority may be less a product of rational consideration of the tangible consequences of doing so than of simple social conditioning about how to act in the presence of authority figures in general.

188. There may be circumstances in which the official technically does not possess the appropriate power over the plaintiff, but either the official or the injured party reasonably assumes that the official does have that authority. Because the effect on the parties operates equally whether the victim or the officer believes the officer to have the power, apparent authority should be sufficient to trigger the due process clause. If nothing else, the officer's actual assertion of coercive force is an unmistakable statement to the less knowledgeable plaintiff that such authority exists. The ability to produce that effect comes from the officer's authority, because the official appears to be in a superior position to know the extent of the authority.

teractions involving formalized relationships are significantly different than applying the power theory of duty.[189] *Daniels* holds that when the immediate cause of the loss is the government official's negligent or inadvertent conduct, there is no deprivation. Under the theory proffered in this Article, such losses would come within the protection of the due process clause even if the actor only negligently or inadvertently causes them, provided that the loss is caused in the process of some exercise of governmental power.[190] For example, imprisonment or execution of an individual resulting from negligently mistaken identity would result in a deprivation subject to due process protection.[191] Similarly, in a governmental benefit example, a caseworker who accidentally cuts off a welfare recipient's benefits would cause a deprivation and the due process clause would entitle the deprived recipient to appropriate procedural safeguards.[192]

2. Nonformalized Interactions

a. *Ordinary Interactions Involving Injury*

Among the free-form, nonformalized interactions between government officials and civilians, there are two paradigmatic opposites on which both this Article's power theory of duty and the *Daniels* state of mind test agree. On one end of the spectrum is the injury that the intentional shooting of an arrestee by a police officer causes.[193] On the other end is the injury that

189. The subcategory of formalized interactions was discussed *supra* notes 174-83 and accompanying text.

190. *See supra* notes 92-100 and accompanying text. Most deprivations in the course of formalized interactions will be the result of deliberate action. Deliberateness is not sufficient, however, to bring a deprivation within the protection of the due process clause under the *Daniels* test. *See supra* notes 49, 100. It is difficult to imagine unintended losses resulting from some of the formalized actions mentioned above, such as the passage of a statute. Still, legislative oversight in the sense of error, is not an unknown phenomenon, as when the statute sweeps more broadly than intended because the legislature did not foresee all of its possible applications. *Cf.* Bouie v. Columbia, 378 U.S. 347, 354-55 (1964) (reversing conviction under trespass statute on due process ground that state court application of statute to persons remaining on premises after requested to leave broadened statutory coverage beyond fair meaning of wording).

191. *Cf. supra* note 97 (discussing Baker v. McCollam, 443 U.S. 137 (1979)).

192. *Cf. supra* notes 92-96 and accompanying text.

193. *See Davidson*, 474 U.S. at 348 (citing with approval Johnson v. Glick, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)) (giving example of guards intentionally beating a prisoner as an obvious due process violation); *see also supra* note 16 (discussing *Johnson v. Glick*).

a citizen sustains in an automobile collision with a negligently-driven government vehicle.[194] *Daniels* and the suggested power exercise test both would agree on the results in these two situations, but would reach the result by different methods. Under *Daniels*, the only relevant issue is the actor's state of mind; the shooting is intentional and the collision is only negligent. Under the power exercise test, the shooting amounts to a deprivation because it is an injury caused by a government official in a position of power over the plaintiff in the process of exercising that power. The automobile accident injury is not a deprivation for two reasons. First, if the driver is simply a government driver with no other authority, no governmental power relationship exists between the driver and the plaintiff and thus there is no possibility that an exercise of power is involved. Second, even if the government driver in general enjoys a position of authority over the plaintiff, for example, as a police officer, the driver did not cause the injuries while in the process of exercising any governmental power over the plaintiff. Accidents of this type are sudden and anonymous interactions, and this suddenness precludes the possibility that the government official focused any official attention on the plaintiff.[195]

Changing the state of mind in the shooting hypothetical, a police officer who *accidentally* shoots an arrestee while in the process of apprehension does not cause a deprivation under the *Daniels* test. Under the power exercise test, however, if the defendant accidentally shoots the plaintiff in the course of an arrest, a deprivation results because there is a power relationship between the parties and the injury takes place in the course of the defendant police officer exercising or attempting to exercise governmental power over the plaintiff.[196]

194. This injury is in the parade of horribles that Justice Rehnquist suggests in Paul v. Davis, 424 U.S. 693, 697 (1976); *see also Parratt*, 451 U.S. at 544 (concluding that drafters of fourteenth amendment did not intend for it to play a role under such circumstances).

195. *See supra* note 186 and accompanying text. The same reasoning would apply to slip-and-fall incidents on state property, such as that involved in *Daniels*. Either the parties responsible for the condition leading to the accident are not in a position of power over the persons injured or, even if a governmental power relationship exists; for example, when the person in charge of keeping passageways clear is a law enforcement officer, the injury does not occur in the process of a focused exercise of governmental power.

196. *Cf.* Wilson v. Beebe, 770 F.2d 578, 581-87 (6th Cir. 1985) (en banc) (holding that negligent act of police officer, whose gun discharged while officer handcuffed plaintiff, did not constitute substantive due process violation).

Changing the state of mind in the collision hypothetical, if a government driver, even one possessing no authority to do more than drive government vehicles, *intentionally* runs into someone, there is a deprivation under the *Daniels* test. Under the power exercise test, however, the results will depend on who the government driver is and what the driver is doing at the time of the collision. If the driver possesses no governmental authority over citizens and intentionally crashes into another vehicle or person, the resulting injury may be a violation of state tort law or may be a criminal offense, but causes no deprivation for due process purposes. Because there is no governmental power relationship between the parties, governmental power cannot be a factor in the injury. If the driver is a police officer who intentionally crashes a squad car into a suspect's car in the process of an arrest, a court should treat the situation no differently from the use of a more conventional weapon in the same context. The court should find that a deprivation occurred because an official in a position of governmental authority caused the injury while in the process of exercising that authority.[197]

Returning to the original state of mind in the two hypotheticals but varying the power dynamics involved, the results under the power exercise test would change, but the *Daniels* test result would remain the same. In the modified shooting hypothetical, a police officer who intentionally shoots a superior officer causes a deprivation under *Daniels*. Under the power exercise test, however, there would be no deprivation because the police officer has no authority over the superior and therefore could not have committed the shooting while in the process of exercising authority.[198] In the modified collision hypothetical, there is no deprivation under *Daniels* if a police officer, while attempting to make an arrest, negligently crashes into the car of a suspect. Under the power exercise test, this would constitute a deprivation. An official power relationship exists between the parties and, although the injury was unintended, it occurred after the official focused attention on the plaintiff, and thus occurred in the course of an exercise

197. *Cf.* Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986) (holding that substantive due process was violated when police officer "use[d] a police vehicle to terrorize a civilian").

198. This would not be the case under the power exercise test if, for example, the officer had specific authority over the superior officer, such as a warrant for the superior officer's arrest, and shot the superior in the process of trying to make that arrest.

of governmental power.[199]

In the above discussion of the exercise of governmental power, we have presumed that any attention that an official in a superior power position focuses is official attention.[200] That presumption applied easily to the hypotheticals above. The question arises, however, whether this presumption should be rebuttable. For example, a civilian victim and a police officer are friends and an altercation arises between them from a purely personal dispute such as the police officer intentionally shooting the friend because the friend is having an affair with the officer's spouse.[201] Clearly, the officer focused on the victim and exercised coercive force, but was governmental power involved? One would have to examine the facts closely to determine whether the badge of governmental authority assisted the tortfeasor in some way. If the officer can show that the two protagonists knew each other well; that there was an overriding, coherent, private motive for the shooting; and that the interaction bore no traces of a governmental power relationship, such a showing might remove it from the scope of any due process duty. Because the mere possession of a badge of authority has a significant effect on interactions between citizens and officials,[202] however, the officer would bear a heavy burden of persuasion and a court should exclude the shooting from due process requirements only in extreme cases.[203] If the officer and victim are strangers, however, governmental authority played its presumed role in the interaction. For example, a po-

199. Whether any of these hypotheticals constitute a violation of due process is a different question, *see supra* note 166, as is the issue of whether good faith immunity would preclude damages liability, *see supra* note 110.

200. *See supra* notes 186-88 and accompanying text.

201. This is an example given by Professor Whitman in a slightly different context. *See* Whitman, *Constitutional Torts*, *supra* note 102, at 33 n.144; *see also infra* note 254 (discussing issues raised by government actors who cause harm for personal reasons).

202. *See supra* notes 184-88 and accompanying text.

203. *See* Basista v. Wier, 225 F. Supp. 619 (W.D. Pa. 1964), *rev'd in part, aff'd in part*, 340 F.2d 74 (3d Cir. 1965). In *Basista*, the defendant police officer went to the plaintiff's house to talk to him about a complaint lodged by the officer's sister-in-law. *Id.* at 621. Despite the unusual family ties, the visit's official focus should be determinative under the power-exercise test, regardless of other factors that might have been involved. The family aspects could be relevant for other purposes, however, such as for establishing or defeating a good faith immunity defense. The case is not so personal that no governmental power was involved. Often, courts deal with these kinds of problems as state action questions. See *infra* notes 242-54 and accompanying text; *see also* S. NAHMOD, *supra* note 8, § 2.08; M. SCHWARTZ & J. KIRKLIN, *supra* note 8, § 5.4.

lice officer may claim to have beaten a person otherwise unknown to the officer, not to accomplish an arrest, but for such personal reasons as not liking the person's looks or attitude or because of the officer's frustrations at home or on the job. The presence of these sorts of personal reasons does nothing to negate the profound effects that mere possession of the badge of authority has in any interaction between state officials and civilians. Moreover, a government official who uses official power to vent personal animosity is probably at the center of the due process concern for arbitrary exercise of the powers of government.[204]

b. *Misdirected Exercises of Power*

An exercise of power that causes injury, but which the actor does not direct toward the plaintiff, will have a different result under *Daniels* than under the power exercise test. The most common examples are an innocent bystander who is hit by a police bullet fired at an escaping suspect and an innocent bystander who is hit by a police car engaged in a high speed chase.[205]

Both of these instances involve unintended injury and, under the *Daniels* test, presumably would not constitute a deprivation.[206] Under the power exercise test, although a general power relationship existed, the officer did not focus on the *plaintiff*. Indeed, the problem is usually that the officer did not even realize that the plaintiff was in the vicinity. The officer did, however, cause the injury in the process of exercising or attempting to exercise governmental power over *someone*. In this sense, a government officer is wielding power in a focused way and causing injury in the process, a situation that is the concern of the due process clause.[207] The power exercise

204. Similarly, when the defense to a due process violation action is that the officers did not exercise governmental power because they acted outside the scope of their governmental authority, there is clearly a deprivation. *See* Monroe v. Pape, 365 U.S. 167, 171-72 (1961), *discussed* in note 1, *supra*. In *Monroe*, the injury occurred after an official focus of attention and there is every reason to believe that the officer enjoyed the advantages of having the badge of authority identified earlier in this Article.

205. *See, e.g., Parratt*, 451 U.S. at 551 n.9 (discussing collision in Hamilton v. Stover, 636 F.2d 1217 (6th Cir. 1980) (unpublished opinion), *cert. denied*, 452 U.S. 915 (1981)).

206. The instances would not constitute deprivations even if the state actors intended to cause injury to one person, but actually caused it to another. *See supra* note 100.

207. *See supra* notes 163-70 and accompanying text.

test, to the extent that it includes negligent conduct, encompasses unintended injuries so long as they are within the scope of the risks against which the due process clause protects. It is reasonable to include similarly unintended injuries that unintended plaintiffs suffer so long as the government actor causes the injury while in the process of exercising power over someone.[208]

Having a rule of misdirected exercises does not remove the necessity that the conduct which causes a loss, in order to constitute a deprivation, must be conduct that seeks to exercise governmental power over *someone*. Although the actor need not have focused the exercise of power on the eventual plaintiff, the actor must have focused it on someone. This follows from the premise that the due process clause is concerned only with conduct constituting an exercise of power over citizens. This distinguishes the losses suffered by innocent bystanders hit by police bullets that were intended for fleeing felons from the losses that occur when a state national guard ammunition dump explodes. While the former constitute deprivations, the latter do not. The power exercise test also distinguishes among types of explosions: while losses caused by the ammunition dump explosion would not constitute deprivations, there would be a deprivation if the police caused the destruction of one house by detonating a bomb on the roof of another home in an attempt to flush out criminal suspects.[209]

c. *Failure to Act*

One question that frequently arises in discussions of consti-

208. A rule to govern misdirected exercise of governmental power might be somewhat similar to the transferred intent notion in torts and the criminal law. As noted earlier, transferred intent does not work under the Court's version of deprivation. *Intent* in the sense that the Court uses the term in *Daniels* is an intent to be abusive or oppressive toward the victim. It makes no sense to transfer intent from a context in which it could not be abusive or oppressive to one in which it is. *See supra* note 100. In the power-exercise context, however, the only thing that must be "transferred" is focus, and focus is equally significant for purposes of determining whether there is a deprivation in both the transferor and transferee contexts.

209. Perhaps it goes without saying that a police officer's misdirected exercise of power that injures a fellow officer should not constitute a deprivation because there is no power relationship between the victim and the assailant. A case that involves a stray bullet from a shoot-out *between officers* that hits a civilian bystander presents a more difficult conceptual problem. The shoot-out does not involve the power dynamic necessary for a deprivation should the bullet hit one of the officers, but the activity does cause injury to someone in a power position inferior to both the participants in the shoot-out.

tutional torts is whether a failure to act constitutes a violation of due process.[210] Arbitrary exercise of the powers of government include instances in which governmental power is arbitrarily applied as well as instances in which it is arbitrarily withheld.[211] When an official's affirmative action causes a loss, the issue is whether that act involved an exercise of power over the plaintiff. To determine whether a failure to act constitutes a deprivation, the court must make a similar inquiry.

If it is an action's capitalization on the power disparity between the injured person and the government official that triggers the due process duties, it is logical to expect that the greater the power disparity, the greater the obligations of the official. In this area, one can distinguish between "normal" power disparities and "unusual" or "special" power disparities. An armed police officer stopping a citizen on the street exemplifies the ultimate governmental power imbalance; losses caused in that context are at the core of due process. Yet this is a "normal" disparity in power because the suspect still enjoys the normal ability to avoid some kinds of harm, such as injury from tripping over a curb while walking. A civilian in an especially vulnerable position, however, is more likely to face injury not only from official action, but also from the official's failure to act. For example, if a police officer deprives an arrestee of the normal ability to protect against injury by shackling the arrestee in handcuffs and leg irons, there is a "special" power disparity and the officer has a duty not only to refrain from causing injury by positive action, but also to take affirmative steps to protect against the additional risks of injury attributable to the arrestee's special vulnerability. In deprivation terms,

210. *See* DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 299 (7th Cir. 1987), *aff'd*, 108 S. Ct. 988 (1989) (discussed *supra* note 79); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982); *see also* Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 872-80 (1986) (surveying cases that address question of what constitutes due process violation).

211. Classifying failures to act as arbitrary exercises of governmental power also follows from the impossibility of drawing a coherent line between misfeasance and nonfeasance in the law. *See* PROSSER & KEETON, *supra* note 49, § 56, at 374-75; *supra* note 152. For example, in an auto accident case, the failure to keep a proper lookout can be either a nonfeasance (as stated) or a misfeasance (driving a car without maintaining a proper lookout). Similarly, the injuries in *Daniels* and *Davidson* could be considered the result of nonfeasance (failing to move the pillows or failing to take protective action based on the note) or of misfeasance (placing and leaving the pillows on the stairs or leaving the shift without telling the superior about the note). Even more broadly, the misfeasance could be framed as running a prison without taking the steps necessary to protect the plaintiffs from the injuries.

a greater disparity of power may impose an affirmative obligation on the officer to employ power to prevent or mitigate the harm that would result from a failure to employ power. If "normal" disparity of power tells the officer to "do no harm," "unusual" disparity may tell him to "do something to help."

It makes no sense to impose affirmative duties unless the government official realizes that the other person is in an especially vulnerable position and the official is able to do something about it. Consequently, it is only if the official has focused on the plaintiff's particular circumstances that any affirmative duties will arise.[212] When the plaintiff's unusually vulnerable position is the product of the officer's own actions or the actions of other government actors of which the officer has knowledge, one can assume that the officer has focused on the plaintiff's vulnerable position. When the especially vulnerable position is the result of nongovernmental factors, the plaintiff will have to prove that the officer had focused on the plaintiff's situation. Once a court finds that the officer focused on the plaintiff's special vulnerability, the court should find a duty to act to prevent harm whenever the official has the actual power to do so.[213]

Justice Blackmun's dissenting opinion in *Davidson* takes an approach analogous to the one suggested here.[214] He states that "once the State has taken away an inmate's means of protecting himself from attack by other inmates a prison official's negligence in providing protection can amount to a deprivation of the inmate's liberty, at least absent extenuating circumstances."[215]

> When the State of New Jersey put Robert Davidson in its prison, it stripped him of all means of self-protection. It forbade his access to a weapon. . . . It forbade his fighting back. . . . It blocked all avenues of escape. The State forced Davidson to rely solely on its own agents for

212. This corresponds to the requirement that official attention must have focused on the injured civilian, as mentioned in the earlier discussion of deprivations resulting from the violation of negative duties. *See supra* note 186 and accompanying text.

213. In an interesting parallel, 42 U.S.C. § 1986 (1982), passed in 1871 along with § 1983, creates a cause of action for injuries caused by a conspiracy to violate civil rights against any person who, "having knowledge that any of the wrongs conspired to be done . . . are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do."

214. This approach appears in Justice Blackmun's discussion distinguishing the facts of *Daniels* from those of *Davidson*. *Davidson*, 474 U.S. at 354 (Blackmun, J., dissenting).

215. *Id.*

> protection. When threatened with violence by a fellow inmate, Davidson turned to the prison officials for protection, but they ignored his plea for help. As a result, Davidson was assaulted by another inmate.[216]

In contrast, "[w]hen the State incarcerated Daniels, it left intact his own faculties for avoiding a slip and a fall."[217] "Daniels in jail was as able as he would have been anywhere else to protect himself against a pillow on the stairs. The State did not prohibit him from looking where he was going or from taking care to avoid the pillow."[218]

Essentially, Justice Blackmun distinguished between "normal" and "special" power disparities. *Daniels* presented a "normal" power disparity, creating only a duty to avoid causing harm in the process of exercising power. *Davidson* presented a case of "special" vulnerability to harm, which created a more extensive duty to exercise power affirmatively to prevent the occurrence of that harm.[219]

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216. *Id.* at 349.

217. *Id.* at 350.

218. *Id.* at 355.

219. An often-cited due process case involving special vulnerability to harm that would qualify under the analysis above is White v. Rochford, 592 F.2d 381 (7th Cir. 1979). In that case, police officers left children in a car by the side of the road without adult supervision on a cold evening after taking the adult driver into custody. *Id.* at 383. The court found that the officers' conduct constituted a deprivation. *Id.* at 384. Because the proffered analysis requires that the officer focused on the plaintiff's particular condition, however, many of the cases alleging failures of police to protect would encounter problems. *See, e.g.*, Bowers v. DeVito, 686 F.2d 616, 617-18 (7th Cir. 1982), *discussed in* note 152, *supra*. In this respect, the requirement that the government official focus on the victim's special vulnerability resembles the "special relationship" idea that some courts have borrowed from tort law, *see* PROSSER & KEETON, *supra* note 49, § 56, at 373-74, and have applied in due process cases when the affirmative duty to act is an issue. *See* S. NAHMOD, *supra* note 8, § 3.10 (citing sources); *see also* Wells & Eaton, *supra* note 163, at 8-11 (arguing that courts should impose duty to act when government contributes to creation of dangerous condition); Note, *A Theory of Negligence for Constitutional Torts*, 92 YALE L.J. 683, 696-99 (1983) (arguing that courts should impose special duty on public officials as matter of constitutional tort policy). *Compare Bowers*, 686 F.2d at 618-19 (finding no duty to protect plaintiff who was random victim of released mental patient) *with* Estate of Bailey *ex rel.* Oare v. County of York, 768 F.2d 503, 509-11 (3d Cir. 1985) (finding duty to provide protection for abused child slain by mother's boyfriend because special relationship existed between victim and authorities). As this Article went to press, the Supreme Court decided a case that largely disapproves of the special relationship theory, holding that the due process clause imposes no affirmative duty to protect vulnerable individuals from harm unless they are in state custody. *See* DeShaney v. Winnebago County Dep't of Social Servs., 108 S. Ct. 988 (1989). *DeShaney* rejected the "special relationship" theory as applied to the failure to remove an abused child from its home. *See supra* note 79.

E. POTENTIAL OBJECTIONS TO A DUTY ANALYSIS

The most obvious objection to the proposed theory of duty lies in its origin in tort law. The Supreme Court has insisted that it will not "make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[220] In *Daniels*, the Court also cautioned that the Constitution "deals with the large concerns of the governors and the governed" and not with "laying down rules of conduct to regulate liability for injuries."[221]

There are two responses to this objection. First, one can doubt the sincerity and strength of the Court's "font of tort law" admonition, because the Court regularly violates it, most recently in *Daniels* itself.[222] The *Daniels* Court found that the wording of the due process clause embodies state of mind distinctions that it borrowed wholesale from tort law.[223] It is inconsistent to find these distinctions in the due process clause while rejecting as irrelevant longstanding common-law understandings about the scope of the government's responsibility toward its citizens.[224] On the one hand, the Court warns against borrowing well-developed common-law duties that could well reflect settled understandings about what conduct the Constitu-

220. Paul v. Davis, 424 U.S. 693, 701 (1976), *quoted in Daniels*, 474 U.S. at 332.

221. *Daniels*, 474 U.S. at 332.

222. The absolute and qualified immunities that the Court has created or adapted from the common law over the years are also examples of the Court ignoring the admonition. *See* Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 781-94 (1987) (pointing out lack of historical support for many immunities). Although the Court often attributes the immunities to § 1983, rather than to the Constitution or federal common law, it applies the immunities to actions against federal officials that involve no applicable statute. *See* Butz v. Economou, 438 U.S. 478, 504 (1978) (it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials").

223. *See supra* notes 49, 88; *see also* Whitman, *Governmental Responsibility*, *supra* note 112, at 248-54 (discussing inappropriate application of tort concepts when liability of governmental entities is involved).

224. *See Daniels*, 474 U.S. at 335-36 (rejecting rule of South v. Maryland, 59 U.S. (18 How.) 396, 402-03 (1856), which set forth common-law duties of a jailer "as stating no more than what this Court thought to be the principles of common law and Maryland law applicable to that case"); Baker v. McCollan, 443 U.S. 137, 146 (1979) (rejecting common-law duty to ascertain whether arrestee is person named in arrest warrant); *see also supra* notes 21-24 and accompanying text (discussing Court's rejection theory that some common-law tort doctrines are incorporated into the due process clause).

tion requires of government actors in specific situations.[225] On the other hand, the Court rushes in to encrust the due process clause with tort-like state of mind requirements based on facile assumptions about the framers' use of the word *deprive*.[226] The truer statement of the "font of tort law" admonition is that there *is* a fourteenth amendment "font of tort law," but it spews forth only *restrictive* tort law concepts. The duty concept used in this Article qualifies under this revised version of the admonition.

Second, the charge that finding duties embodied in the general guarantees of the Constitution involves making the Constitution a "font of tort law" calls for a simple demurrer: the Constitution is *supposed* to be a "font" of duties imposed on government officials. The Court does not hesitate to use the Constitution as a source to "[lay] down rules of conduct" in injunctive cases.[227] Because section 1983 enforces the Constitution and "is not itself a source of substantive rights,"[228] the proper scope of section 1983,[229] at least in terms of duties, can only be the scope of the Constitution itself.[230] If the Court is

225. *See supra* notes 18-27 and accompanying text.

226. *See supra* notes 52-91 and accompanying text, *see also* Whitman, *Governmental Responsibility*, *supra* note 112, at 225-26 (decrying Court's increasing use of "language of tort" to limit protections of Constitution); *supra* notes 109-12 and accompanying text.

227. *Daniels*, 474 U.S. at 332; *cf.* Hutto v. Finney, 437 U.S. 678, 710-14 (1978) (Rehnquist, J., dissenting) (arguing that Constitution does not mandate limiting period of punitive isolation of prisoners and therefore limit is beyond power of federal court to order).

228. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979); *see also* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979) (holding that § 1983 does not protect against anything, but merely provides a remedy).

229. *See* Jackson v. City of Joliet, 465 U.S. 1049, 1050-51 (1984) (White, J., dissenting from denial of certiorari).

230. Certainly no other sources for rights and duties suggest themselves. If the Court somehow suspects that in constitutional tort cases it is not construing the Constitution, but is doing something illegitimate, it is easy to understand why its decisions in those cases have taken such a winding course and have shown such little attention to serious constitutional analysis. In this respect, Wells and Eaton have presented a rather puzzling look at the question of duty in constitutional tort cases. *See* Wells & Eaton, *supra* note 163, at 1. In an otherwise excellent and creative piece dealing with the scope of constitutional torts, the authors find it necessary to justify constitutional tort duties as a species of "subconstitutional rule" in the manner of "constitutional common law." *Id.* at 18; *see also* Shapo, *supra* note 2, at 324 (stating constitutional tort "is not 'constitutional law,' but employs a constitutional test"). Reliance on a nonconstitutional basis for duties in damages cases, however, is no more necessary than in analogous injunctive cases. In both, duties come directly from the Constitution and the authorization to apply them comes from Congress's authorization of "an action at law, suit in equity, or other proper proceeding for

suggesting that distilling a specific rule of duty for a particular case from a general command of the Constitution is not a legitimate endeavor, then it has called into question the whole nature of constitutional case-by-case adjudication.[231]

The key to rejecting objections to a duty analysis because it is a torts concept is the realization that it is *not just* a torts concept. Duty concepts already determine important issues about the limits of constitutional rights. In constitutional adjudication, the most fundamental level at which courts engage in a duty analysis—albeit unknowingly most of the time—is in determining who has a particular right. This determination is important because standing law requires that plaintiffs assert their "own rights"[232] and prohibits them from asserting "the legal rights of third parties" except under special conditions.[233] If a court attempted to explain how far a constitutional right extended and in the process distinguished between third party and "first party" standing, it probably would do so in terms of duty.[234]

Using a simple example, assume that a prison official promulgates a regulation that allows revocation of "good time" credits for disciplinary reasons without prior notice or the opportunity for a hearing.[235] Subsequently, two people claim that procedural due process requires prior notice and hearing: a prisoner who loses the good-time credit and must serve a longer sentence and a state employee whose job it is to schedule and handle clerical matters related to such hearings, but who is laid off because there is no longer a need for hearings as a result of

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redress," 42 U.S.C. § 1983 (1982), and from the Court's power to imply a right of action under the Constitution, *see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

231. The Court also has drawn into question Congress's power to legislate. Any refusal to "[lay] down rules of conduct to regulate liability for injuries," *see Daniels*, 474 U.S. at 332, flies in the face of Congress's precise assignment of that task to the federal courts. Section 1983 provides that persons violating "rights, privileges, or immunities secured by *the Constitution* . . . shall be *liable to the party injured* in an *action at law*" in the federal courts. 42 U.S.C. § 1983 (1982) (emphasis added); *cf.* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957) (holding that Congress may direct federal courts to fashion common law for labor disputes).

232. Warth v. Seldin, 422 U.S. 490, 499 (1975).

233. *Id.* at 500-01.

234. This is because right and duty are interrelated. If the defendant has no duty to the plaintiff, the plaintiff has no right as against the defendant. *See* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-44 (1913).

235. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 546-47 (1974).

the new regulation. Although the regulation violates due process and injuries to both persons result, only the prisoner has standing to sue. Turning to more familiar standing situations, the Court has said that doctors challenging the constitutionality of a state's restriction on abortions do not assert their own rights, but those of their patients.[236] The Court also has held that homebuilders challenging the constitutionality of an alleged racially exclusionary zoning ordinance can be asserting only the rights of would-be residents of the area rather than their own rights.[237] The explanation for these conclusions that may come to mind is that the prisoner, the patients, and the would-be residents are the ones directly affected by the actions of the defendants, while the hearing clerk, the doctors, and the builders are only indirectly affected, but this does not answer the question. Why is it that we trace a line from the defendant's actions to the hearing clerk, doctors, or builders only through the prisoner, patients, or would-be residents?[238]

A duty analysis supplies the answer and it applies to these examples in the same way that it applies to the tort cases involving statutory duties and to the due process deprivation question under discussion.[239] A duty extends to a person and that person has a corresponding right when that person's injury

236. *See* Singleton v. Wulff, 428 U.S. 106, 112-18 (1976).

237. *Cf.* Warth v. Seldin, 422 U.S. 490, 514-16 (1975) (finding that builders lacked standing).

238. To the extent that the causation and redressability requirements of standing law are tests of the directness of the injury, the connection between the challenged action and the injury in the prisoner-hearing hypothetical is arguably stronger for the clerk than for the prisoner. Although the prisoner probably would not have to show that he would win if the state held a hearing, current standing law would seem to require that there be some likelihood that the prisoner would prevail. *See* Allen v. Wright, 468 U.S. 737, 756-58 & 757 n.22 (1984) (stating that redressability of "concrete interests" must not be "entirely speculative"); Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973) (stating that plaintiff's claim that she would receive support payments absent prosecutor's discriminatory refusal to bring nonsupport action was "at best . . . speculative"). Although holding a hearing would redress the prisoner's injury of loss of good-time credits only if she won the hearing, merely holding the hearing redresses the clerk's injury. This Author has argued in a previous article that the real injury in such a situation is the lack of procedural safeguards, an injury that is completely redressed simply by requiring that hearings be held. *See* Burnham, *Injury for Standing Purposes When Constitutional Rights are Violated: Public Value Adjudication at Work*, 13 HASTINGS CONST. L.Q. 57, 77 n.112, & 86-87 (1985); *cf.* Orr v. Orr, 440 U.S. 268, 271-73 (1979) (holding, in equal protection challenge to sexually discriminatory alimony statute, that there is redressability and hence standing even if challenger has little chance of changing alimony award).

239. *See supra* notes 138-50 and accompanying text.

is within the scope of the risks against which the duty and right protect. The tangible injuries to the hearing clerk, the doctors, and the builders are losses of income.[240] Unless we are willing to say that full employment for them is at the core of the constitutional provisions involved, the conclusion that the holder of the right is someone else is inescapable. The injuries to the prisoner (serving a longer sentence); the patients (restrictions on what they may do with their bodies); and the would-be residents (restrictions on where they may live based on race); are more directly within the mainstream of the risks against which procedural due process, the right to privacy, and the equal protection clause protect. A court that assumes or holds that a right belongs to one group or another has implicitly determined the scope of the rights and duties imposed.[241]

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240. Additional intangible injuries may be involved as well. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (recognizing injury that defendant's racial steering activities caused to open housing organization's counselling and referral services); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 262-63 (1977) (finding plaintiff developer's interest in building in restricted area "stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce"); *see also* Burnham, *Aspirational and Existential Interests of Social Reform Organizations: A New Role for the Ideological Plaintiff*, 20 HARV. C.R.-C.L. L. REV. 153, 187-200 (1985) (arguing that harm to organizational well-being caused by the defendant's conduct that is being challenged can be sufficient injury for standing purposes).

241. Determining that the injuries to the hearing clerk, the doctors, and the builders are not within the scope of the risks against which the constitutional rights protect does not mean that these plaintiffs cannot have standing. If the challenged conduct causes them injury of any kind, they may qualify under third party standing rules. *See* Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 278, 301-10 (1984). Thus, a court can view third party standing as a rule allowing a person whose injury falls *outside* the scope of the risks against which a right protects to argue on behalf of absent persons whose injury falls *within* that scope. *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 78-79 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-19, at 134-36 (2d ed. 1988). Moreover, "first party" standing may exist to challenge the conduct if the injuries to the hearing clerk, doctors, or builders are found to be within the scope of the risks defined by some *other* constitutional right. In abortion cases, some courts read the liberty that the due process clause secures broadly to include not only the patient's decision as to whether to have a child ("family" privacy), but also the privacy interest in the physician-patient relationship, which would value the interests of the doctor as well as the patient. *See* Singleton v. Wulff, 428 U.S. 106, 113 (1976) (reserving decision on whether limitations on abortion rights violated "the doctor's own 'constitutional rights to practice medicine' "). Additionally, plaintiffs have made the broader substantive due process claim, albeit unsuccessfully, that the Constitution protects against all unreasonable interference with a person's right to freely engage in the "common professions of life." *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 98 (1873) (Field, J., dissenting); *see also*

When a court determines that a particular injury does not constitute a deprivation because the risk of that type of injury is not among those against which the due process clause protects, that court is similarly setting the boundaries of the due process right involved. In rights terms, the court effectively is saying that the due process right alleged does not belong to the plaintiffs and it does not belong to *anyone* asserting this type of injury. Although there may exist some state common-law duty and the injury may fall within the scope of that duty, that is of no concern to the federal court in a civil rights case. The duty analysis proposed here is simply an explicit application of the logic that courts have used implicitly for years in constitutional right adjudication. Such an approach should not fail merely because courts use the same analysis in tort law.

There is a less fundamental objection to the duty analysis that does not disagree with the scope of the risks analysis, but, rather suggests that courts could engage in the same analysis under a rubric other than "duty." Proponents of this objection argue that courts could use an evolving, yet still minor, aspect of the state action doctrine to resolve some of the issues raised here.[242] The fourteenth amendment mandates that *states* provide due process; the state action doctrine determines whether it is the state that is acting. The doctrine is invoked most commonly when the person who is the immediate cause of the injury is a *private* actor and it questions whether that person's actions are the actions of the government.[243] The strain of state action doctrine that courts would have to use in constitutional tort cases, however, is a converse form, maintaining that a *government official's* actions might not, in some circumstances, be

Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (enumerating various fundamental rights that citizens of the several states enjoy). If these rights exist, they would belong to these plaintiffs and the government would owe them a concomitant duty because the injuries fall within the scope of the risks protected against by these rights.

242. *See* S. NAHMOD, *supra* note 8, § 2.08; M. SCHWARTZ & J. KIRKLIN, *supra* note 8, § 5.4; Whitman, *Constitutional Torts*, *supra* note 102, at 33 n.144.

243. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149, 157-66 (1978) (holding that private creditor action under bulk sales provisions of U.C.C. is not state action); Hudgens v. NLRB, 424 U.S. 507, 512-21 (1976) (holding that privately-owned shopping center's action prohibiting picketing is not state action); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-59 (1974) (holding that action of privately-owned, state-regulated utility in terminating utility service is not state action). *But see* Shelley v. Kraemer, 334 U.S. 1, 18-23 (1948) (holding that private homeowner's enforcement of racially restrictive covenant by judicial process is state action).

the actions of the government.[244]

The cases that apply the state action doctrine in this way seem to parallel the duty analysis. For example, in *Polk County v. Dodson*,[245] the Supreme Court held that a public defender appointed by a state court to represent the plaintiff was not a state actor when he moved to withdraw as counsel.[246] In so holding, the Court suggested a functional approach to state action, finding it significant that the public defender's assignment "entailed functions and obligations *in no way dependent on state authority*," because the relationship between the parties was "identical to that existing between any other lawyer and client."[247] A case with facts more similar to what has been discussed in this Article is *Stengel v. Belcher*,[248] where the defendant was an off-duty, out-of-uniform police officer who shot several bar patrons in a barroom brawl, killing some and seriously injuring others.[249] Seeing the issue as one of state action, the Sixth Circuit affirmed a jury verdict in favor of the plaintiffs.[250] The court observed:

> The fact that a police officer is on or off duty, or in or out of uniform is not controlling. "It is the *nature of the act performed*, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law."[251]

The Supreme Court dismissed certiorari as improvidently granted, but the opinion of Chief Justice Burger concurring in that dismissal hints that the Court would have affirmed the

244. The basis for this application is dictum from Screws v. United States, 325 U.S. 91, 111 (1945), which states that "acts of officers in the ambit of their personal pursuits are plainly beyond the scope of state action," and therefore fail to meet the color-of-law requirement of the criminal counterpart to § 1983, 18 U.S.C. § 241. *See supra* note 204. Professor Nahmod calls this application "the converse of the typical state action question." S. NAHMOD, *supra* note 8, § 2.08, at 88.

245. 454 U.S. 312 (1981).

246. *Id.* at 318.

247. *Id.* (emphasis added). The Court explicitly reserved decision on whether the same is true of public defenders acting in their administrative or investigative capacities. *See id.* at 325.

248. 522 F.2d 438 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976).

249. *Id.* at 440.

250. *Id.* at 441.

251. *Id.* (emphasis added) (quoting Johnson v. Hackett, 284 F. Supp. 933, 937 (E.D. Pa. 1968)); *see also* Layne v. Sampley, 627 F.2d 12, 13 (6th Cir. 1980) (holding that off-duty status of police officer is not determinative of state-action question); 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE § 58 (2d ed. 1980) (citing cases).

lower court.[252] The Chief Justice pointed out that the defendant officer testified that he had intervened to arrest several of the plaintiffs pursuant to departmental rules requiring intervention under such circumstances. In addition, the officer used a gun and mace issued by the police department.[253]

These applications of state action concepts seem to embody a scope of the risk analysis similar to that employed under a duty theory and could perhaps reach similar results.[254] Even if state action employed virtually the same analysis as the duty theory, however, a duty label is nonetheless preferable.

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252. Belcher v. Stengel, 429 U.S. 118, 120 (1976) (Burger, C.J., concurring).

253. *See id.* at 120 (Burger, C.J., concurring). Under these facts, the power exercise theory proffered above would dictate a finding of deprivation, because the officer enjoyed a position of power over the plaintiffs and caused the injury while in the process of attempting to exercise that power over them. *See supra* notes 169-170 and accompanying text.

254. There is some indication that the analyses differ. Professor Whitman suggests, for example, that if a government truck driver intentionally runs down her husband's mistress for "personal reasons," there is no state action, but if the defendant is a "policewoman who shot, beat, or jailed her rival," there is state action. Whitman, *Constitutional Torts*, *supra* note 102, at 33 n.144; *cf. supra* text accompanying note 201 (discussing a similar hypothetical in duty terms). Whitman observes, consistent with the duty analysis, that the state action issue is "whether the government involvement has provided the actor with special authority or power that enables her to hurt others in ways not available to private citizens," and she implies that no state action is involved in her truck driver hypothetical because "a government truck cannot do any greater harm than any other truck." Whitman, *Constitutional Torts*, *supra* note 102, at 33 n.144. If the state-action test focuses on the instrument used in the injury and on the presence of personal reasons for the action, it departs from the duty analysis. As for the method of injury, one could respond that there should be no different outcome in the two situations because, as is the case with the truck, the government gun or club "cannot do any greater harm" than a private gun or club. Under the power-exercise test, the instrument used to cause harm *may* say something important about the nature of the power relationship between the parties, but the means used to cause injury is not decisive; the nature of the power relationship between the parties is. A government truck driver shooting or beating someone will not constitute a deprivation, but a police officer's use of a government or private truck to run down an arrestee will. *See supra* text at note 197. As for the reasons for taking the action, it should not matter that "personal reasons" are involved if the power relationship is the same. Thus, the police officer who beats up or uses a truck to run over an arrestee for the "personal reason" that she did not like his looks or attitude or that she was simply mad at the world nonetheless violates a due process duty. It is hard to follow the "personal reason" argument as a state action concept to any point short of accepting Justice Frankfurter's dissenting position in Monroe v. Pape, 365 U.S. 167, 224-46 (1961) (Frankfurter, J., dissenting). *See supra* note 3. The "personal reason" argument is essentially an argument that, because state law prohibits using force for personal reasons, such action cannot constitute state action. *See supra* note 204 and accompanying text.

Any state action test that excludes conduct of government employees which occurs in the course of fulfilling official duties is inconsistent with its very name. It strains traditional concepts of agency to say that a government employee whose job is to drive a government truck and who causes injury while driving that truck engages in purely private action that is not attributable to the government in any way. It is not difficult, however, to say that the conduct of the employee violated no due process duty, because the actor did not cause the injury in the process of exercising governmental power over the plaintiff.

Moreover, state action is purely a causation concept; it purports to define the circumstances under which we can say that it was the action of the government that caused an injury.[255] In tort law, courts have used both proximate cause and duty to limit liability for damage that the defendant's conduct caused.[256] A major criticism of proximate cause is that its use to delineate the extent of the protection that courts should afford to a plaintiff's interests "has led and can lead only to utter confusion" because "[t]his is not a question of causation, or even a question of fact, but quite far removed from both."[257] Although one might employ the same basic analysis in a torts case using either a duty or proximate cause analysis, duty is "less likely than 'proximate cause' to be interpreted as if it were a policy-free factfinding."[258]

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255. For example, in Martinez v. California, 444 U.S. 277 (1980), the Court collapsed proximate cause into state action in what was, in reality, a duty ruling. The Court held that a state parole board's release of a parolee, who had killed the plaintiff's decedent, was not responsible for depriving the decedent of her life. *Id.* at 285. Hinting at state action, the Court observed:

> Appellants contend that the decedent's right to life is protected by the Fourteenth Amendment to the Constitution. But the Fourteenth Amendment protected her only from deprivation by the "*State* . . . of life . . . without due process of law." Although the decision to release Thomas[, the killer,] from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action.

Id. at 284-85.

Only a few sentences later, the Court concluded in proximate cause terms: "[W]e . . . hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. *Id.* at 285; *see also* DeShaney v. Winnebago County Dep't of Social Servs., 108 S. Ct. 998 (1989) (though state was aware of dangers faced by abused child, "it played no part in their creation, nor did it do anything to render him more vulnerable;" therefore, it "had no constitutional duty to protect" him).

256. *See* PROSSER & KEETON, *supra* note 49, § 42, at 274 & n.6.

257. *Id.* § 42, at 273.

258. *Id.* § 42, at 274. The classic example of competing duty and causation

The same analysis applies to the comparison between state action and duty. Although state action is purportedly a "unitary concept" that requires a case-by-case determination of whether sufficient state contacts exist, one can easily see it as a fluid concept that is responsive to fundamental policy choices related to the merits of the underlying claim.[259] The converse form of state action is likely to be even more fluid, because it must explain something that is counterintuitive: how a state officer is not really a state officer. A duty approach, unlike state action, forces the Court to deal explicitly and directly with the issue of the nature and extent of the duties imposed by the due process clause—something it has so far declined to do.

CONCLUSION

The explosion of constitutional tort suits in the federal courts has caused the United States Supreme Court to narrow the circumstances in which courts will allow such actions. Because the due process clause forms the basis for a disproportionate number and a wide variety of those claims, principal among the Court's devices have been limitations on the substantive scope of that clause. The most recent narrowing of the due process clause specified that to constitute an actionable deprivation subject to due process constraints, the conduct of the defendant government official causing a loss must be more than negligent. By excluding all negligently caused losses from the sweep of due process, the Court undoubtedly reached the

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analyses in tort law is the duel between Cardozo and Andrews in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). Proximate cause, as applied in constitutional tort cases, has attracted some fire. Professor Eaton observed that in the law of constitutional torts, the Court has employed proximate cause in a manner that disguises its purpose and underlying policy. *See* Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 461-82 (1982). Eaton calls the proximate cause rationale of *Martinez* "artfully ambiguous," thus allowing the Court to avoid "having to articulate the values underlying the decision." *Id.* at 482; *see also supra* note 255 (discussing *Martinez*).

259. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 9, § 12.5, at 448-50; Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221 (arguing that state action doctrine is used as disguised holding on merits of constitutional claims) and authorities cited therein. In the constitutional tort context, Professor Antieau has complained that, "[i]f a court believes social policy should excuse otherwise unlawful conduct by public servants, it should explore immunities and defenses, rather than finding an absence of 'color of law' from conduct of public servants within the clear scope of their responsibilities." 1 C. ANTIEAU, *supra* note 251, § 58, at 108-09.

desired result of reducing civil rights litigation, but constitutional jurisprudence has suffered significantly in the process. Neither the wording of, nor the policies behind, the due process clause sustain the Court's holding. Moreover, the Court's holding is internally inconsistent, because it produces results contrary to the Court's stated rationale of preventing power abuses by government officials. The holding also has a potentially radical limiting effect on the many important constitutional rights outside of the context of constitutional tort cases that owe their existence to the due process clause.

In obtaining its desired result, the Court has ignored the most direct and logical route to limiting the due process clause: defining the scope of the duties that the due process clause imposes on government action. Although duty is generally thought of as a tort principle, duty concepts pervade all aspects of the law, including constitutional law. A duty theory of due process rights would allow the Court to develop a consistent and coherent approach that would work over the entire spectrum of due process rights and for all forms of relief that injured persons can request to remedy violations of their rights. A duty theory would clearly separate constitutional from common-law tort actions in a manner that would exclude from the federal courts the types of cases that have most bothered the Court, while forcing the Court to confront directly the question of the scope of the due process clause's protections, something that it has so far failed to do.